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REINVENTED TAXATION AND THE TAXPAYER'S DEFENSE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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THURSDAY, JULY 29, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas [chairman of the subcommittee] presiding.

Present: Representatives George W. Gekas, Steve Chabot, Jerrold Nadler, and Martin T. Meehan.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The committee will come to order. Because we lack the necessary quorum to conduct a hearing it being required by the rules that two members shall be in attendance before such a hearing can be conducted, we are forced to recess until the appearance of the next member of this committee, but in the meantime we have kept faith with the Chair's insistence that all hearings and meetings will begin on time. We stand in recess until the appearance of the next member.

[Recess.]

Mr. GEKAS. The record will reflect the attendance of the gentleman from New York, Mr. Nadler, along with the Chair, thus constituting the necessary quorum to conduct a hearing, and so we shall proceed. This hearing has been determined on the basis that something needs to be done about some of the free-wheeling agencies that are part of the Federal Government.

At a time when the Congress is in a heavy momentum toward reducing taxes, both in the House and the Senate and even the administration is contemplating some form of tax cut. While we on the right hand are attempting to do that, on the left hand, driven by the agencies, they have inordinate power conferred sometimes inadvertently by the Congress itself to raise revenues and thus dampening the effect of a tax cut that seems to be moving toward final culmination.

And so we are worried about that. What we want to try to do is to see whether there might be a system that we could develop whereby when an agency contemplates either because they believe that the Congress has authorized them to do so or demanded that they do so or on its own creates a situation in which they innovatively determine that the best way to follow the will of the Con-

gress is to raise revenues. Those practices have to come to the light of day, and the Congress has to take more responsibility for preventing that kind of hidden tax.

So we have several instances of that and, of course, the universal service tax, as we call it, is the prime example of that. And what we do here today and what we will be doing in the introduction and hopeful passage of the legislation that accompanies the content of this hearing will be not so much to upset the process that is already underway in that universal service tax scenario, but to prevent such occurrences in the future. Thus, we will be able to, as a Congress finally gets a handle on the full free-wheeling power of the agencies, to take a couple of words out of a statute and interpret them to suit the way they believe that the intent of Congress should be fulfilled.

It is a very worrisome subject matter and we intend to explore it fully with the witnesses at hand. Does the gentleman from New York have an opening statement?

Mr. NADLER. Yes, Mr. Chairman. Thank you, Mr. Chairman. Well, here we go again. It is time to waste some more taxpayer money holding a ridiculous hearing on fees charged by agencies that Congress has either authorized or mandated. The hearing roster is again packed with the usual list of Republican constituencies. That is the prerogative of the majority. There might have been a little sporting for the majority to invite those agencies, as the minority requested, that will be the subject of today's ceremonial lynching, to testify as well so that we could get their take on these taxes or fees or whatever you want to call them and not have only a one-sided hearing.

I really do not think that a modicum of balance is too much to ask though I am apparently wrong about that. At any rate, I would ask the chairman to join me on a bipartisan basis, after the hearing in sending to each agency the testimony attacking it and requesting the agency provide its response and its side of the story. I really think that is only fair.

We can argue ad infinitum of whether charges are a tax or a fee. I personally like the coinage of past Republican administrations, "revenue enhancements," which still ranks as one of the all time outstanding euphemisms. Whatever they are called, the courts have been clear on what constitutes a tax and the Constitution is equally clear that all measures raising revenues must originate in the House.

Some of these fees, including the universal service charge, have been challenged in court. That particular case is now pending. In one case, that of the domain name fee, Congress acted to remove a legal cloud over the program and to make clear that it was legal. We will hear from one member who does not like this fee and who strenuously disagrees with the majority of the Republican controlled Congress that voted to remove the legal cloud over this fee.

If my colleagues have a quarrel on this account, it is not with an errant agency but with the Republican-controlled Congress that acted to make clear that this fee is a legal fee. The quarrel, apart from pandering to interest groups that do not like paying these fees, appears to come down to an accounting dispute. How much

of a fee goes to the service it is supposed to support and how much goes to other governmental functions.

Excessive fees may be a fitting subject for a lawsuit or for an oversight hearing, but the chairman proposes to do something more. The legislation being considered today would require Congress to act affirmatively to ratify agency actions pertaining to taxes or fees however denominated. The use of the term tax in this context is unclear. I suppose that provision of this bill, if the bill ever passes, will create lots of jobs for trial lawyers.

This bill in reality, aside from being a full employment bill for trial lawyers, is yet another piece of legislation designed not to insure the proper implementation of the law but to tie the executive agencies up in knots. Perhaps wealthy communication conglomerates are more important to the majority than providing rural and inner city schools and hospitals like those in my district and for that matter in the chairman's district with access to the Internet. I personally think universal service is a very good thing.

We have already debated that issue on the merits and it is the law. The chairman's bill wouldn't change the law but it would tie down Congress as we have to revisit every fee rather than do our jobs like, for instance, pass the behind schedule appropriation bills. It would also tie the agencies up in knots wasting time in additional bureaucratic hurdles rather than doing the job Congress has assigned to them.

In the end we are left with Oliver North's contribution to the English language, "plausible deniability." These fees did not spring from the head of Zeus. They are the product of laws and policies this Congress mandated. Now some members want to be shocked to find the money being collected when we authorize the fees and so they seek plausible deniability with hearings and bills like this one.

We have been here before. I suppose we are doomed to return. I would suggest that if members do not like a fee they should take the responsibility for repealing it as Mr. Terry's legislation would do in one instance and either find another source of funding or let the program die and take the responsibility for that. If members think that the agricultural commodity promotion program is a waste of money, they can eliminate it by voting to do so. I can assure you there will be no tears shed in my district in Manhattan or Brooklyn.

We are not going to do that today. We are going to have another round of denunciations and silly process arguments leading nowhere instead. We all know this silly bill is not going to be signed into law. We all know this hearing is simply an attack, an unfair, one-sided attack, on the agencies. If it weren't designed for that, the agencies would have been invited for their point of view as we requested, and we all know it is a waste of time. I yield back the balance of my time before we start wasting the rest of it. Thank you, Mr. Chairman.

Mr. GEKAS. The gentleman has indulged once again in innuendos and attacks and in unwarranted criticism of another member's motivations, namely, the Chair's. This is a serious attempt to look at a very serious problem. The gentleman does it time and time again and despite the efforts of comity on the part of the Chair in every

regard, I have to listen time after time to this kind of tirade impugning the motives or the wisdom by the Chair of bringing before the committee a matter that is of interest and of a serious nature.

The record will reflect that nowhere do I recall a request by the minority, by the gentleman from New York for—nowhere do I recall a request by the minority through the minority ranking member or anybody else to bring a particular agency that is under the gun or being targeted, as the gentleman from New York might imply by these hearings, to bring the other side of the story, to bring witnesses that they believe would counter, but, no, he is satisfied, the gentleman from New York is, in leveling attacks to cover the dissatisfaction he has with looking into an issue that is relevant to the very situation we face here today, the insistence upon the Congress of bringing about tax cutting and to regulate taxes in a way that will be fair to the American people.

So I want the record to reflect that I reject every single word that the gentleman has uttered here today, every single one, and would ask him in the future to downplay some of the personal vitriol that he feels against everything that is done by the Republican majority which is a purely partisan bone in his body that never seems to lack substance. And, therefore, I will proceed with the hearing with an admonition to the gentleman that I will not permit his vitriol to go unanswered.

Mr. NADLER. Mr. Chairman.

Mr. GEKAS. I don't want any more vitriol.

Mr. NADLER. I am not giving any more vitriol. Mr. Chairman, I don't consider it vitriol. I would say that requests were made of the majority staff by the minority staff to invite the agencies. But be that as it may, they were made. But even if they hadn't been made, if you have a hearing like this, the gist of which is various people saying that agencies have acted unfairly, that they are abusing their authority by enacting taxes in the guise of fees, elementary fairness and not only fairness but elementary if you are going to learn anything from a hearing, would dictate that you invite at least some of the agencies so you hear the other side.

Mr. GEKAS. The gentleman has amply stated his insistence on fairness so he begins the whole proceeding with an unfair intempered attack on the Chair and its motivation. Therefore, we are well balanced now. We are both angry and so let's proceed with the hearing. We have a distinguished panel of colleagues who are interested in this subject matter and not in vitriol, I don't believe.

J.D. Hayworth is serving this third term representing Arizona's Sixth Congressional District. He serves on the House Ways and Means Committee and he is the first representative from Arizona to be appointed to that committee. He earned a bachelor's degree from North Carolina State University in speech communications and political science. He and his wife Mary have three children and are residents of Scottsdale, Arizona.

Lee Terry was elected to Congress for the first time in 1998. He represents Nebraska's Second Congressional District. Before coming to Congress, he served on the Omaha City Council for 8 years, 2 years as vice president and 2 years as president. He was also a highly respected Omaha lawyer being the managing partner of a small law firm specializing in civil cases. Congressman Terry

serves on the Committees on Transportation, Banking and Government Reform. So with that, we will proceed and we will call upon the gentlemen to proceed as they were introduced. Representative Hayworth first.

STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. HAYWORTH. Mr. Chairman and ranking member of the subcommittee, distinguished guests, thank you for inviting me here today to testify in support of the Taxpayer's Defense Act. It is an honor to join you, Mr. Chairman, in our effort to end taxation without representation. And I would ask unanimous consent at this point to include my full statement in the record. I would also like to thank the ranking minority member who brings to these proceedings a sense of civility and softspokenness that is completely in character with the fine people he represents in the State of New York.

The Taxpayer's Defense Act would establish a system to allow Congress, and only Congress, to approve new taxes before they take effect. Before an administrative tax could be imposed on the American people, an agency would submit the rule or regulation to our Congress. The majority leaders in both the House and Senate would introduce the bill by request. The bill would then be subjected to expedited procedures but would not go into effect until passed by the House and Senate and signed by the president. It is important to note that this legislation would only affect future administrative taxes, not those currently in effect.

I believe the constitutional precedent for this legislation is clear. Article 1, section 8 of the Constitution gives Congress "the power to lay and collect taxes." It doesn't give unelected, unaccountable bureaucrats this power; it only gives the power to Congress. Moreover, the Constitution's separation of powers clause ensures that each branch of government would have one specific duty.

By delegating legislative powers to unelected officials, we are allowing the executive branch to become the maker and enforcer of our Nation's laws, which is in direct violation of the Founders' intent. By enacting the Taxpayer's Defense Act, Congress would once again restore accountability to Federal taxation and reduce the hidden taxes that are being imposed on the American taxpayer.

While administrative taxation has not been used often, it is used increasingly to circumvent the legislative process. One of the most troubling administrative taxes is the Federal Communication Commission tax on long distance telephone service, also known in my district and throughout the country infamously as the Gore tax. Every telephone caller in the United States is subjected to this tax, which raises approximately $2.5 billion annually.

Other regulatory agencies are also doing an end run around Congress, including the Commerce Department's $1 tax on every Internet domain name. The National Science Foundation has tried a similar approach by authorizing a $30 tax on registration of domain names on the Internet. Fortunately, a Federal judge ended this illegal tax, but not before taxpayers shelled out $60 million. The U.S. Department of Agriculture, through the Agricultural Marketing Service, has also gotten into the game with taxation of food

commodities in order to fund advertising and promotion of commodities.

The point is simple, Americans cannot hold unelected executive branch employees accountable for this administrative taxation. However, Americans can hold their representatives accountable for these taxes if we once again require Congress to vote on all of these administrative taxes. The Taxpayer's Defense Act would achieve this simple, practical and, I believe, noble goal.

In December, 1773, American colonists boarded three British ships in Boston Harbor and emptied their chests of tea into the sea. This event, which we all know as the Boston Tea Party, celebrated American opposition to taxation without representation. That is why the Constitution specifically states that Congress shall have the power to tax. I urge this subcommittee to once again make Congress accountable for all taxation by passing this important legislation.

Thanks again, Mr. Chairman, for the opportunity to testify in support of the Taxpayer's Defense Act. I am very happy to remain here and to answer any questions that you or any other members of the subcommittee may have.

[The prepared statement of Mr. Hayworth follows:]

PREPARED STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Chairman Gekas, members of the subcommittee, and distinguished guests, thank you for inviting me here today to testify in support of the Taxpayer's Defense Act. It is an honor to join you in our effort to end taxation without representation.

The Taxpayer's Defense Act would establish a system to allow Congress, and only Congress, to approve new taxes before they take effect. Before an administrative tax could be imposed on the American people, an agency would submit the rule or regulation to Congress. The Majority Leaders in both the House and Senate would introduce the bill by request. The bill would then be subjected to expedited procedures but would not go into effect until passed by the House and Senate and signed by the president. It is important to note that this legislation would only affect future administrative taxes, not those currently in effect.

I believe the constitutional precedent for this legislation is clear. Article I, Section 8 of the Constitution gives Congress the "power to lay and collect taxes." It doesn't give unelected, unaccountable bureaucrats this power; it gives only Congress this power. Moreover, the Constitution's "separation of powers" clause ensures that each branch of government would have one specific duty. By delegating legislative powers to unelected officials, we are allowing the executive branch to become the maker and enforcer of our nation's laws, which is in direct violation of the Founders' intent. By enacting the Taxpayer's Defense Act, Congress would once again restore accountability to federal taxation and reduce the hidden taxes that are being imposed on the American taxpayer.

While administrative taxation hasn't been used often, it is used increasingly to circumvent the legislative process. One of the most troubling administrative taxes is the Federal Communications Commission (FCC) tax on long distance telephone service, which is also known as the Gore tax. Every telephone caller in the United States is subjected to this tax, which raises approximately $2.5 billion annually. Other regulatory agencies are also doing an end run around Congress, including the Commerce Department's $1 tax on every Internet domain name. The National Science Foundation has tried a similar approach by authorizing a $30 tax on registration of domain names on the Internet. Fortunately, a federal judge ended this illegal tax, but not before taxpayers shelled out $60 million. The U.S. Department of Agriculture, through the Agricultural Marketing Service, has also gotten into the game with taxation of food commodities in order to fund advertising and promotion of commodities.

The point is simple: Americans can't hold unelected executive branch employees accountable for administrative taxation. However, Americans can hold their representatives accountable for these taxes if we once again require Congress to vote

on all of these administrative taxes. The Taxpayer's Defense Act would achieve this goal.

In December 1773, American colonists boarded three British ships in Boston harbor and emptied their chests of tea into the sea. This event, which we all know as the Boston Tea Party, celebrated American opposition to taxation without representation. That is why the Constitution specifically states that Congress shall have the power to tax. I urge this subcommittee to once again make Congress accountable for all taxation by passing this important legislation.

Thanks again, Mr. Chairman, for the opportunity to testify in support of the Taxpayer's Defense Act. I would be happy to remain here to answer any questions you or any other member of the subcommittee may have.

Mr. GEKAS. Representative Terry is recognized.

STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. Thank you, Mr. Chairman, Mr. Ranking Member. Thank you for inviting me here to testify on the Taxpayer's Defense Act. I commend you and the co-author, J.D. Hayworth. This important legislation will affirm the Constitutional principle that only Congress can establish or raise taxes. I am here today specifically to describe to you an example of an agency assessing an unauthorized tax on the Internet.

I will also tell you about the steps the agency took to overturn a court decision that held its tax to be illegal, as well as my legislative effort to reverse the after-the-fact ratification of the tax by Congress. In 1992, Congress gave the National Science Foundation a mandate to support development of the Internet. NSF granted Network Solutions, Inc., the exclusive right for 5 years to register all second-level domain names. These are the Internet addresses using .org or .com.

Network Solutions was to get $4.8 million for expenses over 5 years, plus $365,000 in profits. No registration fee was charged under this original contract but NSF gave Network Solutions the right to charge such a fee, beginning in September, 1995. The fee was $100 for domain name registrations, the initial ones, and then $50 for renewals.

Thirty percent of the fee was a "preservation assessment," which was deposited in an Internet Intellectual Infrastructure Fund. Expenditures from the Fund were to be controlled by the NSF. The preservation assessment generated more than $62 million from September, 1995, through March, 1998. Several individuals and small businesses mounted a legal challenge to the fee. On April 6, 1998, the U.S. District Court for the District of Columbia ruled that the 30% preservation assessment was an unconstitutional tax, not authorized by Congress. Judge Hogan pointed out that the fee was involuntarily assessed, exceeded the cost of providing the service, and was used for a governmental purpose.

Network Solutions stopped collecting the preservation assessment. However, section 8003 of an Emergency Supplemental Appropriations bill, signed May 1, 1998, retroactively ratified the 30% portion of the fee. Key congressional negotiators were not aware at the time that this portion of the fee had been ruled an unconstitutional tax. A bipartisan group of Senators and Congressmen voiced after the fact objections to the provisions, saying that they never intended to ratify a tax, let alone a tax on the Internet.

The Court nonetheless ruled on September 10, 1998, that the ratification would stand unless Congress acted to reverse its action within 6 months. That did not happen, and NSF spent the money 1 day after the 6 months had run. When I heard about this, I drafted and introduced H.R. 749, the Home Page Tax Repeal Act. Senator Ashcroft has introduced a companion measure in the Senate. Our legislation would simply repeal section 8003, effective April 30, 1998. This would reinstate the Court's ruling and allow the unconstitutional tax to be refunded to the Internet users.

H.R. 749, which has bipartisan support, has two purposes. First, by repealing a bad precedent, Congress will signal its continued support for a tax-free Internet. Secondly, like the Taxpayer's Defense Act, it will tell agencies that they must get express approval from Congress before levying such taxes. Both Americans for Tax Reform and the American Conservative Union have endorsed H.R. 749, and I am hopeful and expect that they will also support this measure. I congratulate you, Mr. Chairman, for taking the lead on this issue, and hope that both of our bills move promptly. I request that my entire statement with its enclosures be submitted for the record.

[The prepared statement of Mr. Terry follows:]

PREPARED STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman and members of the Committee, thank you for inviting me to testify today on the proposed Taxpayers Defense Act. I congratulate you and your co-author, J.D. Hayworth. This important legislation will affirm the Constitutional principle that only Congress can establish or raise taxes.

I am here today to describe for you a specific example of an agency assessing an unauthorized tax on the Internet. I will also tell you about steps the agency took to overturn a court decision ruling the tax illegal, as well as my legislative effort to reinstate the court's ruling.

This story starts in 1992, when The Scientific and Advanced Technology Act gave the National Science Foundation (NSF) a mandate to support development of the Internet and facilitate its use. Subsequently, NSF granted Network Solutions, Inc., the exclusive right for five-years to register all United States Internet second-level domain names. These are the Internet addresses supplementing top-level domain names such as .com and .org. The cost of this agreement was to be paid from the NSF's operating budget. Approximately $4.8 million would cover Network Solution's expenses, with an additional $365,000 for profits.

No registration fee was originally charged, but Network Solutions later requested and received from NSF the right to charge such a fee. Beginning in September 1995, Network Solutions charged $100 for new domain name registrations and $50 for renewals.

30 percent of the fee was termed a "Preservation Assessment." It was deposited in an "Internet Intellectual Infrastructure Fund." Expenditures from the Fund were controlled by NSF.

Because of the explosion of the Internet, the money collected by Network Solutions generated much more than the original agreement contemplated. The Preservation Assessment alone generated $62 million from September 14, 1995 to March 31, 1998.

A group of individuals and small businesses challenged the fee in federal court. On April 6, 1998, Judge Thomas Hogan of the U.S. District Court for the District of Columbia ruled that the Preservation Assessment was not authorized by Congress and thus, under Article I, Section 8, of the Constitution, was "clearly" an improper tax on Internet users. He noted that the fee was involuntarily assessed, exceeded the cost of providing the service, and was used for governmental purposes. The judge enjoined further expenditure of those funds. (*William Thomas et al.* v. *Network Solutions, Inc. and National Science Foundation*, Civ. No. 97–2412.) By agreement of the parties, Network Solutions stopped collecting the Preservation Assessment.

NSF then went to appropriators to seek relief. Language was first offered in Conference and was included in section 8003 of the 1998 Emergency Supplemental Appropriations and Rescissions Act, signed May 1, 1998 (Public Law 105–174). Prior collection of the 30 percent portion of the fee was expressly ratified. Congressional negotiators were not aware that this portion of the fee had been ruled an unconstitutional tax less than one month earlier.

Key Members of Congress subsequently voiced objections to the provision and said they never intended to ratify a tax. Among those speaking out were Senate Majority Leader Lott, Senate Appropriations Chairman Stevens, Democratic Senate Appropriations members Hollings and Inouye, Senator Breaux, and House Ways and Means Chairman Archer.

The Court nonetheless ruled on September 10, 1998, that the ratification would stand unless Congress acted to reverse its action. $39.2 million in the Internet Intellectual Infrastructure Fund was held in escrow for six months after the court's decision in order to give Congress time to act. Congress could not act in time, and the money was obligated by NSF soon after the six-month period expired. (An additional $23 million had been appropriated for NSF to upgrade the Internet in the FY 1998 VA/HUD Appropriation Act.)

When this situation was brought to my attention, I drafted and introduced the "Home Page Tax Repeal Act"—H.R. 749. Senator John Ashcroft has introduced a companion measure, S. 705. The bills would repeal section 8003, effective April 30, 1998. This would reinstate the Court's determination and allow the unconstitutional tax money to be refunded to Internet users.

H.R. 749, which has bipartisan support, has two purposes. First, by repealing a bad precedent, Congress will signal its continued support for a tax-free Internet. Secondly, like the Taxpayers Defense Act, it will tell agencies that they must get express approval from Congress before levying new taxes.

I congratulate you, Mr. Chairman, for taking the lead on this issue, and hope that both of our bills move promptly.

Mr. GEKAS. Without objection the written statements of both members shall be included as part of the record. We have a custom that we do not subject the members unless they want to stay to cross examination, but I do have just one question for Representative Terry. Had our bill become law before the Internet controversy began to which you testified, would that have been prevented in your judgment?

Mr. TERRY. It would have been prevented because the Congress, the action that Congress took to legitimize the tax was after the fact. This bill would have subjected it to a before ratification review by Congress. Not speaking for how it would turn out in predictions, but I would think that in the interest of Congress, having passed a sense of Congress not to tax the Internet, that it would have been successfully defeated to tax what I call the front end of Internet use which is registering your domain name.

Mr. GEKAS. Does the gentleman have any questions?

Mr. NADLER. Yes. I would like to commend Representative Terry for going about it the right way, introducing a bill on the specific alleged tax—I am puzzled by something. Without getting to the merits of this particular tax, I mean here is a situation where the agency levies what it dominates, a fee pursuant presumably to some Congressional authorization to levy fees. Somebody decides it is not a fee, it is a tax, and they go to court and the court says you are right, it is not a fee, it is a tax, the agency acted improperly, and stops it.

Now if someone had been more on the ball earlier they could have gone in for an injunction before $60 million was collected, but they didn't do that. Congress comes along and apparently acting in ignorance, and I hesitate to say that Majority Leader Lott and Appropriations Chairman Stevens and Senators Breaux and Hollings

and Inouye acted in ignorance, but they apparently say they did. Anyway, Congress apparently acting in ignorance says, no, no, no, we meant it to be authorized, that is okay. Now you want to repeal that, which is fine and the merits are a different question.

But what was wrong with this picture? In other words, in terms of the hearing we are having today, agencies can only levy fees in accordance with a delegation of authority from Congress to do so within certain limits. Congress presumably gave those delegations knowing what it was doing and put on whatever limits Congress saw proper. If the agency goes beyond those limits in somebody's opinion, they can go to court and get an injunction. They don't have to wait till $60 million has been collected.

What is wrong with that scheme? Why do we need legislation that will force a lot of work on both Congress and the agencies for every time they have an administrative fee?

Mr. TERRY. First, the last part would probably be better answered by the authors of the bill but, talking specifically, I will tell you that my constituents, at least, don't see a lot of difference between fee and tax when they have to pay a governmental unit to be able to do anything like, for example, specifically with my bill, register their domain name whether it is Nadler.com or Terry.com or U.S. West.com.

Therefore, if you think of it by way of protection of the citizenry from paying the government for some service in lumping it philosophically and the whole thing, I think we need to have a discussion up front, force the issue of whether it is a fee or a tax. And that is why I think the beauty of at least forcing the issue by this bill.

Mr. NADLER. But aren't you really arguing that Congress should be more careful in delegating to the agencies or limiting the limits of the delegation to issue fees in the first place? They can't decree a nickel in fees except pursuant to Congressional authorization to do so. What you are really saying, I think, is that Congress perhaps is being too loose in those delegations.

Mr. TERRY. Well, it is a matter of perception. My personal belief is that we have been probably too loose in controlling it, but at least in this specific instance what Congress mandated to the NSF is to somehow control the registration of domain names to be the collector. They in turn then took it to the next level and decided to create a fee and then said, heck, while we are creating a fee let's make it large enough that we create an extra pool of cash to use for other things.

In this particular instance I am not sure Congress ever had the sense that there was even going to be a fee charged since it was done, I think, at least 2 years after Congress mandated the NSF to register domain names.

Mr. NADLER. Let me ask you just one more question. I am not intimately familiar with the domain names legislation or any of that, but, presumably, if the problem with that fee legally was that it was too large and, therefore, went beyond the administrative cost of what they were doing and collected money for other things which is, I think, what you represented. The court found presumably Congress in some legislation, either that bill or some earlier legislation specifically gave to the FCC the right to authorize a fee.

Now if there is a problem with the implementation of that legislation, they are going hog wild and implementing fees where they shouldn't or too large fees as the court in this instance found, it would seem to me the proper solution is for Congress to be careful about the authority it grants in issuing fees and not to set up a new bureaucratic procedure for every single fee.

Mr. TERRY. The court's decision is interesting because it hits on all the points that you raised. It decided to focus strictly on the admitted part that $70 was to recoup costs and $30 of the $100 domain registration fee was to just create this pool of cash. Nonetheless, it also at least mentioned the fact in there because part of the suit was on that initial $70 too that what Congress told the NSF, or requested the NSF to do, was collect a database of domain names.

They then interpreted that 2 or 3 years later, and they needed to charge a fee for that. The court did not go into whether or not that was constitutional or unconstitutional, in essence, saying it was constitutional by the fact that it didn't go into it. So I think what that does is then it puts the ball back in our court, to say what tools can we implement to force the front-end discussions of whether or not any legislation by the simple fact that the NSF was mandated to collect this and 2 or 3 years later they say we need to charge a fee for this.

If you go back and look at the initial legislation, I don't think you will see any provision in there that said that they had the right to collect a fee.

Mr. NADLER. So where did they get the authority for the fee? They must have gotten it some place.

Mr. TERRY. There is a belief out there that there is an inherent right to that if something—if an action is authorized, i.e., collecting data of domain names, then they will have a right to collect a fee. I think that is what this legislation is doing is saying look, we are stepping back and saying I don't believe agencies have that inherent authority and that we need legislation to clarify that.

Mr. NADLER. Thank you.

Mr. TERRY. You are welcome, sir.

Mr. GEKAS. We thank our colleagues, and as we indicated their statements will become a part of the record and will become a part of the debate that is yet to come. Thank you, gentlemen. We acknowledge the attendance now of the gentleman from Ohio, Mr. Chabot, whose written statement will be entered into the record and who has the right to amplify on it or review it, whatever the gentleman desires.

Mr. CHABOT. Mr. Chairman, perhaps I could speak very briefly in my opening statement.

Mr. GEKAS. The gentleman is recognized.

Mr. CHABOT. We have additional witnesses, I assume, coming up shortly.

Mr. GEKAS. Yes.

Mr. CHABOT. Okay. I will be very brief then. Last year unelected bureaucrats of the FCC unleashed the Gore tax, a new tax levied on phone service which affects virtually every American. This past May, the FCC decided to expand this unconstitutional tax when

they voted to fund the schools and libraries program at $2.25 billion for its second year of operation.

Unfortunately, the FCC overlooked one small detail during the implementation of this odious tax, only Congress can levy taxes. Our Constitution clearly confers to Congress the power of taxation, a power already used far too often. Congress has not delegated the authority to agencies, and therefore, any such tax in my view is both illegal and unconstitutional.

Allowing unelected Federal bureaucrats to impose new taxes on American citizens violates the deeply-rooted principles of our democracy. The Taxpayer's Defense Act, of which I am a co-sponsor, is intended to enforce the Constitution and prevent Federal agencies from establishing taxes by requiring Congressional approval of any rule or regulation which would levy a new tax on the American people.

The Gore tax is but one example of an illegal, in my view, tax levied by an agency. This legislation would protect taxpayers from unaccountable bureaucratic taxation that these agencies may, in the future, attempt to impose. I would also like to point out that, while I strongly support this legislation and the noble goals that it seeks to accomplish, I believe that Congress should go further. Instead of limiting the application of this legislation to future agency taxes, I believe we should expand it to agency taxes that have been imposed in the past.

I would again like to thank the chairman for holding this hearing, and I apologize for being late but I have got four hearings going on at the same time.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF HON. STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Thank you very much, Mr. Chairman, for bringing this important legislation before us today.

Last year, unelected bureaucrats at the FCC unleashed the "Gore Tax"—a new tax levied on phone service which affects virtually every American. This past May, the FCC decided to expand this unconstitutional tax when they voted to fund the schools and libraries program at $2.25 billion for its second year of operation.

Unfortunately, the FCC overlooked one small detail during the implementation of this odious tax: *Only Congress can levy taxes.* Our Constitution clearly confers to Congress the power of taxation—a power already used far too often. Congress has not delegated this authority to agencies, and therefore, any such tax is both illegal and unconstitutional.

Allowing unelected federal bureaucrats to impose new taxes on American citizens violates the deeply-rooted principles of our democracy. The Taxpayer's Defense Act, of which I am a proud cosponsor, is intended to enforce the Constitution and prevent federal agencies from establishing taxes by requiring Congressional approval of any rule or regulation which would levy a new tax on the American people.

The "Gore Tax" is but one example of an illegal tax levied by an agency. This legislation would protect taxpayers from unaccountable bureaucratic taxation that these agencies may, in the future, attempt to impose.

I would also like to point out that, while I strongly support this legislation and the noble goals that it seeks to accomplish, I believe that Congress should go further. Instead of limiting the application of this legislation to future agency taxes, we should expand it to agency taxes that have been imposed in the past.

I would again like to thank you for holding this important hearing. I am anxious to work with you as we move forward in our efforts to prohibit these unconstitutional taxes and restore accountability to the federal government.

Mr. GEKAS. We thank the gentleman. We now invite panel number two to take their rightful places at the witness table. Rick

Joyce is a partner in the Washington, D.C. law firm of Joyce & Jacobs. He represents Celpage, Inc., for whom he filed briefs in the fifth circuit case dealing with the FCC's tax on telecommunications. His areas of expertise include domestic and international telecommunications regulations and transactions, new technology and electro property litigation and Federal legislation.

Mr. Joyce was a double major in broadcast communications and political science at George Washington University, and he earned his law degree from Georgetown. He is joined by Ted Garrish, the Vice President for Legislative Affairs at the Nuclear Energy Institute. He previously served as Senior Vice President of Government Relations at the American Nuclear Energy Council. Mr. Garrish served in a number of positions with the Reagan administration. He received an AB degree from the University of Michigan and a JD degree cum laude from Wayne State University.

They are joined by Dan Gerawan, the President of Gerawan Farms in Reedey, California. His family began farming in 1936 and his father built the company to one of the largest plum, peach and nectarine farms in the country. That is a lot of vitamin C there for all of us. We will ask the panel to begin their testimony in the order in which they were introduced. We will ask unanimous consent that the written statements of each of the witnesses be entered as part of the record without objection, and then ask each individual to restrict the testimony to about 5 minutes in review of the written testimony, and we will try to keep you to that 5 minutes because we have other witnesses. Mr. Joyce shall begin.

STATEMENT OF RICK JOYCE, ESQUIRE, JOYCE & JACOBS, WASHINGTON, DC, REPRESENTING CELPAGE, INC.

Mr. JOYCE. Thank you, Mr. Chairman, and committee members. Thank you for inviting me to testify this morning. I am appearing this morning on behalf of our client, Celpage, Inc. Celpage, Inc. is a Puerto-Rico-based FCC licensed paging company. It is the largest privately-owned messaging company in Puerto Rico. Celpage also is the only telecommunications carrier in the United States that has challenged the FCC's universal service program in court as an unconstitutional tax.

In Celpage's appeal which is pending before the U.S. Court of Appeals for the Fifth Circuit, we contend that the FCC's universal service rules do not comply with the universal service statute enacted by Congress and the universal service fund is in reality a hidden tax on telecommunications carriers administered by the FCC for a broad array of general welfare programs.

Celpage's appeal does not question the desirability of subsidized telephone service or discounted Internet services for schools, libraries and rural health care providers. Rather, we simply contend that the Constitution requires Congress, not the FCC, to determine the desirability of these social goals and to then appropriate the funds for them. Universal service program is surely a regulatory tax. This tax was not enacted in accordance with the constitutional requirements of revenue bills. Its parameters have been defined exclusively by an independent Federal agency, the FCC.

The FCC presumably believes it is acting in the public's best interest in implementing this enormously expensive and complicated

program. Nevertheless, not one member of the FCC was elected to that office. However well intentioned as this program may be it bluntly violates the core constitutional requirement that only elected officials in Congress have the authority to levy and collect taxes and adopt legislation that promotes the general welfare.

Although this tax is assessed against telecom carriers, the costs of the program are borne largely by millions of customers who pay the universal service fees on their pager, cellular telephone and long distance telephone bills. The universal service program is comprised of four funds, the High Cost Fund, the Low Income Fund, the Schools and Libraries Fund, which is commonly referred to as the E-rate Program, and the Rural Health Care Fund.

Total disbursements from the four funds for 1998 were actually $3.4 billion. About one-third of that went to the Schools and Libraries Fund. Estimated collections for the first three quarters of 1999 alone will be approximately $3 billion. The FCC has authorized up to $2.25 billion this year for the School and Libraries Fund alone. To use a fancy legal phrase this is not chump change.

In 1998 the effective tax rate or what the FCC refers to as the contribution factor was roughly 4% applied to gross telecom revenues. It will probably be at least that high in 1999. Little of this money is spent on any project that directly or even indirectly benefits wireless carriers such as Celpage or Celpage's customers. Roughly ⅔ of the money goes to monopoly local exchange carriers to continue subsidizing basic phone service for low income and rural customers.

Most of the rest of the money goes to the new Schools and Libraries Program for a variety of Internet access and basic telephone services. Money in that fund is transferred mainly to computer services companies that they are not even subject to FCC regulation or to monopoly local phone companies who surely don't need the money. In the rare case where schools and libraries discounts have been approved for cellular or paging services, it typically means only that the funds are being used to subsidize services that would normally be purchased with local budget funds.

The FCC claims that this is not a tax program, rather that telecom carriers are merely paying a regulatory fee, and some have suggested that telecom carriers and their customers ought to pay these taxes because they derive special benefits from these programs. In fact, there is no correlation between the universal service tax imposed and any special government benefits bestowed upon telecom service providers. Telecom carriers, particularly competitive carriers such as paging carriers, derive no benefits from these programs other than what the average citizen would derive from having Internet access in schools and libraries or subsidized telephone services.

In any event, it is not the telecom industry's unique obligation to promote Internet access in our schools and libraries. The U.S. Constitution does not say that telecom carriers and their customers must promote the general welfare nor does it say that the FCC has the power to levy and collect taxes. Article 1, section 8 of our Constitution entrusts these powers only to Congress. The impact of this tax is particularly heartfelt by consumers. Regulatory taxes increase service costs. It is just that simple. An example of how the

FCC's program has actually undermined Congress' statutory goals comes from a paging company in Missouri, Ozark Telecom.

For years, Ozark Telecom used to provide low cost paging service to the homeless essentially at cost. The FCC's tax has increased to the point where you may no longer be able to provide this service. Mr. Chairman, I see my time has expired. I would like to say in conclusion that in one of the most important legal decisions of our Nation, *McCulloch* v. *Maryland*, Chief Justice John Marshall wrote that "the power to tax involved the power to destroy." The Constitution quite readily assigned that power to our elected Members of Congress, not to government officials. Thank you.

[The prepared statement of Mr. Joyce follows:]

PREPARED STATEMENT OF RICK JOYCE, ESQUIRE, JOYCE & JACOBS, WASHINGTON, DC, REPRESENTING CELPAGE, INC.

Good morning Mr. Chairman, and Committee Members; thank you for inviting me to testify this morning. My name is Frederick Joyce; I'm a partner with the Washington-based law firm of Joyce & Jacobs, Attorneys at Law, LLP. I'm appearing this morning on behalf of our client, Celpage, Inc. Celpage is a privately-owned, Puerto Rico-based wireless messaging company. Celpage is licensed by the Federal Communications Commission to provide one-way messaging services throughout Puerto Rico and the US Virgin Islands; it is the largest privately owned messaging company in Puerto Rico.

Celpage is the only telecommunications carrier in the United States that has challenged the FCC's universal service program as an unconstitutional tax. In Celpage's appeal, which is pending before the US Court of Appeals for the 5th Circuit, we contend that the FCC's Universal Service Rules do not comply with the Universal Service Statute enacted by Congress, and that the Universal Service Fund is in reality a hidden tax, imposed to expand federal support for a broad array of subsidies and entitlements through assessments on telecommunications carriers and their customers.

Celpage does not question the desirability of universal availability of telephone service, below-cost telephone rates for high cost areas and low-income consumers, or discounted telecommunications and computer services for schools, libraries and rural health care providers. These may all be noble programs; but, it is for Congress and its constituents to determine if these social goals ought to be federally funded. Even the loftiest goals of government must be adopted and implemented within the bounds of Constitutional authority, and the actions of governmental agencies must comply with Congressional delegations of power and basic fairness. Many aspects of the FCC's Universal Service regime violate these sound legal principals. Those violations will have a profound impact on the implementation of a multi-billion dollar subsidy program, the costs of which will be borne at the outset by the telecommunications industry, and ultimately by American consumers.

The Universal Service program is a regulatory tax, imposed by the FCC to continue or expand support of an array of subsidies and entitlements through direct assessments on telecommunications carriers' revenues. This tax was not enacted in accordance with the Constitutional requirements for revenue bills; its parameters have been defined not by this legislative body, but by an independent federal agency; and, despite the warnings of the General Accounting Office, the collection of these revenues and their application to the supported subsidies has been unlawfully carried out by private companies.

Although the FCC presumably believes it is acting in the public's best interests in implementing this enormously expensive and complicated program, not one member of the FCC was elected to that office. The FCC is free to adopt any universal service tax rate it chooses, and free to determine who should pay this tax. For instance, although for now the FCC has imposed this regulatory tax only on interstate telecommunications carriers, it has held open the possibility of expanding the scope of this program to include Internet Service providers and other entities that are not even subject to FCC regulation. However well-intentioned this program may be, it bluntly violates the core Constitutional requirement that only elected officials in Congress have the authority to levy and collect taxes, and adopt legislation that promotes the general welfare.

Although this tax (the FCC refers to it as a "contribution", but it is not elective) is assessed against telecommunications carriers, the costs of the FCC's Universal

Service program have been borne largely by millions of customers who subsidize these federal programs through their monthly pager, cellular telephone and long distance telephone bills. Rather than protesting this regulatory tax, large local and long distance phone companies have been virtually silent for a variety of reasons: most of them pass these costs through to their customers either through rate increases or line-item add-ons; most of them will qualify for reimbursements from the Universal Service fund; and, the FCC has promised to reduce access charges paid by interexchange carriers to offset Universal Service costs.

SUMMARY OF THE UNIVERSAL SERVICE PROGRAM:

The Universal Service Fund ("USF") is comprised of four programs: the High Cost Fund; the Low Income Fund; the Schools and Libraries Fund (commonly referred to as the "E-rate" program); and the Rural Health Care Fund. Funding for the High Cost and Low Income Funds is assessed as a percentage of telecommunications carriers' gross interstate and international end-user revenues; funding for the Schools and Libraries and Rural Health Care Funds is assessed as a percentage of carriers' total gross end-user revenues (intrastate as well as interstate and international).

The USF is currently administered by the Universal Service Administrative Co. ("USAC"), a subsidiary of the National Exchange Carrier Association ("NECA"). For each quarter, USAC provides the FCC with its projected amounts for program demand and administrative costs for each Fund. USAC also reports interest income on the Funds, and periodic "true-up" amounts to reflect over-collections or under-collections from previous quarters; those amounts are taken into account in establishing the amounts to be collected per quarter. Based upon those figures, and upon the reported gross revenues for all telecommunications carriers, the FCC's Common Carrier Bureau develops proposed "contribution factors;" i.e., the percentage tax rates upon which carriers' USF payments will be assessed. Carriers are required to report their gross revenues to USAC semi-annually; assessments are made upon carriers' gross end-user revenues for the preceding year. USAC bills individual carriers for their contribution amounts.

Although USF contributions are assessed only against end-user revenues derived from the provision of telecommunications services, the Universal Service Worksheet requires carriers to report revenue from other sources and services (e.g., revenue from other carriers, equipment sales, and information services). Amounts billed to customers to recover prior USF contributions are treated as end-user telecommunications revenues.

Total disbursements from the four Funds for the 1998 funding year (exclusive of administrative costs) are estimated to be approximately $3,403,923,866.73. Estimated collections for the first three quarters of 1999 (program demand plus administrative costs) will be approximately $2,798,900,000.00.

The USF tax rates can change quarterly; for each quarter, the FCC adopts a "contribution factor" for the High Cost and Low Income Funds (a percentage of carriers' gross interstate and international revenues) and for the Schools and Libraries Fund and Rural Health Care Fund (a percentage of carriers' gross intrastate, interstate and international revenues). The approximate average USF contribution rates for 1998 were as follows: High Cost Fund/Low Income Fund: 0.0316 (3.16% of gross end-user interstate/international revenues); Schools and Libraries Fund/Rural Health Care Fund: 0.0075 (0.75% of total gross end-user revenues). To date, the approximate average USF contribution rates for 1999 are as follows: High Cost Fund/Low Income Fund: 0.0306 (3.06% of gross end-user interstate and international revenues); Schools and Libraries Fund/Rural Health Care Fund: 0.0071 (0.71% of total gross end-user revenues).

There were no great fluctuations in the contribution factors in 1998 from quarter to quarter. For the first quarter of 1999, the contribution factor for the High Cost and Low Income Funds (0.0318) showed little change from the 1998 average (and no change from the fourth quarter 1998 factor); while the contribution factor for the Schools and Libraries and Rural Health Care Funds decreased from 0.0075 in the fourth quarter of 1998 to 0.0058 in the first quarter of 1999. However, for the third quarter of 1999, the contribution factor for the High Cost and Low Income Funds has been decreased to 0.0294, while the contribution factor for the Schools and Libraries and Rural Health Care Funds has been increased to 0.0099.

The following services are eligible for up to 90% discounts from the Schools and Libraries Fund. In most cases, paging and other wireless carriers will end up subsidizing either services that compete against them, or, services that are entirely unrelated to their core businesses:

All telecommunications services for voice or data

Phone lines

ISDN lines
Private lines between eligible acquirers

Internet Access

Basic "conduit" access
data links and additional associated information services, including:
protocol conversion
information storage
information transmission as a common carrier
the transmission of information as part of a gateway to an information service
E-mail

Internal Connections

Routers, hubs, network file servers, wireless LANs, including their installation and maintenance
Software used to operate file servers
Network switches or file servers

CONSTITUTIONAL PROBLEMS WITH THE UNIVERSAL SERVICE PROGRAM:

The FCC claims that this is not a tax program; rather, that telecom carriers are merely paying a "regulatory fee." But, with the universal service program there is no correlation between the tax imposed (a flat, combined rate of approximately 5% assessed against all telecommunications revenues), and any government benefits bestowed upon telecom service providers.

Since this universal service program is not a valid "user fee" program, but is in reality a general revenue program, the Constitution requires that the program originate in the U.S. House of Representatives and be approved by Congress; which was not the case here.[1] The consequences for a violation of the Origination Clause cannot be disputed: we trust that the courts will ultimately strike down the Universal Service provisions that violate the Constitution.[2]

The FCC's program sets a related, dangerous precedent at the state/local level, where there is pressure to reduce income and property taxes. This federal program suggests ways for the states to saddle a particular industry with costs of general welfare programs that should be paid from state/local coffers. For instance, draft legislation in Puerto Rico has suggested imposing a local universal service tax on telecom carriers that could be as high as 10% of gross annual revenues, in addition to applicable income taxes.

CONSUMER PROBLEMS WITH THE UNIVERSAL SERVICE PROGRAM:

Telecommunications customers are clearly disadvantaged by the FCC's universal service program: they end up paying higher service charges, but these regulatory taxes are not used by the FCC to improve their wireless services or the public telephone network. Rather, the money is spent to subsidize computer and telephone services for schools, libraries, lower income and rural customers.

The impact of this tax is particularly hard felt by the consumers of telecommunications products that are already competitively priced, such as paging. As regulatory taxes increase service costs to the consumer, consumers who previously could afford to use both a wireless device and their home phone, may find that they can no longer afford the wireless service, and could elect to discontinue their paging or cellular service. Lower priced/competitive services such as paging are particularly hard hit, since this regulatory tax makes up a larger percentage of the rates charged to customers than is the case for other forms of communications service.

An example of how the FCC's program has undermined Congress' statutory objectives comes from a paging company in Missouri, Ozark Telecommunications. For years, Ozark has provided extremely low-cost paging service to the homeless, essentially at cost; not because the government mandated it, but because the owner thought it was the right thing to do. This privately subsidized service allowed the homeless and others who could not afford basic phone service a phone number they could give out to prospective employers, relief officials, etc. With the imposition of the Universal Service tax, which is imposed on gross telecom revenues, this paging carrier now must decide whether to raise the price of this service, or lose money on every pager that he gives out under this subsidized program, or discontinue the program.

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[1] *See National Cable TV Ass'n* v. *U.S.*, 415 U.S. 336; *William Thomas* v. *Network Solutions.*

[2] *See United States* v. *Munoz-Flores*, 495 U.S. 385, 396–97 (1990); *Marbury* v. *Madison*, 1 Cranch 137, 176–80 (1803).

Similar problems apply to the many fire, police, ambulance and public safety services who subscribe to paging services. Typically, paging carriers provide service to these entities at very competitive rates; and, these users have strict budgets which limit the types of communications services they can acquire. The FCC's regulatory tax has put pressure on carriers to try to honor their commitments to these essential service entities, without losing money on every radio unit.

CONCLUSION

Mr. Chairman, in one of the most important legal decisions of a struggling new nation, *McCulloch* v. *Maryland*, Chief Justice John Marshall wrote that "the power to tax involved the power to destroy." The Constitution quite rightly assigns that awesome power to our elected Members of Congress, not to a handful of government agency officials. We commend your efforts to safeguard Congress' appropriations powers.

Thank you for your time. If there are any questions, I would be happy to try to answer them.

Mr. GEKAS. We thank the gentleman. We turn to Mr. Garrish.

STATEMENT OF THEODORE J. GARRISH, VICE PRESIDENT, NUCLEAR ENERGY INSTITUTE, WASHINGTON, DC

Mr. GARRISH. Thank you, Mr. Chairman. I would like to thank the committee for the opportunity to appear today and provide our views. I am appearing today on behalf of the Nuclear Energy Institute, the policy-making organization for the nuclear energy industry. Our members produce 20% of America's electricity producing an environmentally clean product helping to meet our Nation's clean air goals and providing the much needed base load power on hot days like today.

In the process of using nuclear electricity, our customers pay a minimum of $1.1 billion annual in fees to the Federal Government, and there are principally two that are important today. First, is the waste disposal fee or the nuclear waste fee, and second is the cost of regulating our industry which is the Nuclear Regulatory Commission fee. First, let me turn to the waste fee. The fee is a one mill per kilowatt hour charge on nuclear-generated electricity to dispose of waste.

The fee was created by the Nuclear Waste Policy Act of 1982 and it was essentially a deal struck between the Federal Government which was to dispose of nuclear waste and consumers who were to pay the cost. The intention was to fully fund this operation. There was included in the Nuclear Waste Policy Act, a mechanism to increase the fee that had a one House veto involved with it. That obviously is unconstitutional under the *Chadha* decision.

Let me explain what happened since the Act was passed. To date, $16 billion has been raised. There is $8.6 billion currently in the Nuclear Waste Fund and the total cost for this program will be $42 billion.

Let me tell you what happens each year. This year, $630 million was collected, yet the energy and water bill which passed the House only 2 days ago, appropriated $169 million which means that nearly one-half billion dollars that was collected was used for deficit reduction and not for the purpose that it was intended. That is, to remove nuclear waste.

Now why is that? The reason is that the Nuclear Waste Program must compete with other programs for appropriations under the budget caps, and even though there is a dedicated fund that was set up for this purpose, there is essentially no way to get the

money. The industry is prepared to pay these fees but what we really demand from the Federal Government is service. And the problem to add insult to injury is that the government has defaulted on its obligation and its contract to remove this waste. They were supposed to remove the waste by 1998. They have not done so and they are at least 12 years behind. So what we tell the Federal Government is that you got our money, but we have your waste. This needs to be corrected. The fee system for disposal needs to be totally reformed. We need to have access to this money free of the artificial budget restrictions. But each time a proposal is made, pay-go problems come up, and the answer is always to raise the fee even though $6 to $8.6 billion exists in the fund. Much needs to be done to correct this problem.

But now the fee is increased, when it is increased and the manner in which that is accomplished is extremely important. Your approach is a good start. It is a good approach to have DOE make a recommendation to the Congress, but Congress needs to act affirmatively to prevent unjustifiable increases. That is the constitutionally correct way to do it, and we are supportive of the Taxpayer's Defense Act to do that.

When the reform occurs, Congress needs to follow the procedures that you have outlined and that is what we are recommending in various pieces of legislation that are currently going through the Congress.

Now let me turn for a minute to the Nuclear Regulatory Commission fees. Currently, the NRC fee is $448 million. The fee essentially funds the NRC's operations. In this particular fee, the industry pays for its own regulation. While this may be acceptable, the current methodology also requires the industry to pay an additional $50 million for items not related to the regulation of nuclear plants. For instance, to support the general NRC functions such as its international activities and the payments to agreement states not related to the operation of our plants.

The Taxpayer's Defense Act will allow Congress to scrutinize these payments. There is currently no good mechanism for the industry to protest the improper imposition of these fees. The Taxpayer's Defense Act will do just that. Further, when it is enacted it is our hope that the NRC will be more careful in what is assigned into the user fee category and the industry will only pay those costs directly attributable to us.

Therefore, in conclusion, we believe that you are on the right track with the Taxpayer's Defense Act. These fees, just like taxes, should not be administratively set without the consent of Congress. Thank you for the opportunity to appear, and I am pleased to answer your questions.

[The prepared statement of Mr. Garrish follows:]

PREPARED STATEMENT OF THEODORE J. GARRISH, VICE PRESIDENT, NUCLEAR ENERGY INSTITUTE, WASHINGTON, DC

Chairman Gekas, Ranking Member Nadler and members of the subcommittee, my name is Ted Garrish. I am a vice president at the Nuclear Energy Institute. NEI is the policy-setting organization for the U.S. nuclear energy industry. We represent more than 275 members worldwide, including every U.S. electric utility that operates a nuclear power plant, as well as suppliers, nuclear fuel cycle companies, engineering and consulting firms, radiopharmaceutical laboratories, universities, and labor unions.

Nuclear power plants produce nearly 20 percent of the nation's electricity and provide the largest source of emission-free energy in the United States. This energy source must be sustained to meet the energy, economic and environmental protection demands of the 21st century.

The U.S. nuclear energy industry has built a solid record of safe, efficient performance at the nation's 103 nuclear power reactors, making it the global leader in advanced nuclear power technology.

Obviously a critical component in determining the economic vitality of any industry is the tax structure under which it must operate. In the nuclear power industry, we are faced with somewhat unique circumstances. Our industry pays a user fee for its regulation by the Nuclear Regulatory Commission, and pays a millage fee for the ultimate storage of our used nuclear fuel. It is rare for an industry to pay for both the disposition of its used fuel and also its own regulation.

But it does not stop there. The nuclear industry, through its customers, actually pays for much more. The Nuclear Regulatory Commission annually collects nearly $50 million from user fees to pay for programs that are not directly related to regulating our industry. During the next fiscal year, it is anticipated that the Federal government will collect an additional half billion dollars more into the Nuclear Waste Fund than it appropriates to programs dedicated to its intended purpose, the management of used nuclear fuel.

While these two revenue raisers are generally referred to as fees, the fact is that both are broad-based taxes that are ultimately being collected from the consumers of nuclear generated electricity—used by nearly every American.

Because of the basic unfairness of the way these fees are applied to the nuclear power industry, I would like to voice our industry's support for the Taxpayer's Defense Act. Although this legislation would not solve all of the problems I mention, at a minimum, the protections offered by The Taxpayer's Defense Act would cause some significant positive changes in programs important to our industry.

The Nuclear Waste Fund was established in 1982 by the Nuclear Waste Policy Act (NWPA). That legislation imposed a one mill per kilowatt-hour fee on customers who use electricity generated by nuclear power. In return for paying this user fee to the Nuclear Waste Fund, the federal government was made responsible, by law, for the transport, storage and disposal of all commercially generated used nuclear fuel.

The Nuclear Waste Fund now receives a minimum of $630 million per year. To date, consumers have committed about $16 billion to the fund. As was fully intended by Congress, spending from the Nuclear Waste Fund in its initial years has not approached the revenues generated by the one-mill fee. In fact, the Energy Department has spent only $5.9 billion on the program, including $1.2 billion from defense appropriations. There is a balance of $8.6 billion.

According to a Department of Energy report[1] released in December 1998, the one mill per kilowatt-hour fee will be sufficient to raise the $43 billion needed to fund the nuclear waste disposal program to its completion several decades from now. However, in the unlikely event that current projections prove incorrect, a mechanism was included in the NWPA to increase the fee.

Under current law, the Energy Secretary may propose a fee adjustment for consideration by the Congress. Under a provision that is generally considered unconstitutional, current law allows the Secretary's recommended fee increase to go into effect unless disapproved by one branch of Congress. Allowing one-house to override the Secretary's recommended fee increase amounts to a one-house veto of the type declared unconstitutional by the Supreme Court in 1983.[2] The nuclear industry feels strongly that an affirmative vote of both houses of congress should be required to raise any tax or fee.

Over the past decade, Congress has used billions of dollars from the Nuclear Waste Fund to pay for totally unrelated programs—not the management of used nuclear fuel. At the same time, the Federal government already has failed to meet its obligation to begin disposing of used nuclear fuel by January 31, 1998.[3]

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[1] Analysis of the Total System Life Cycle Cost of the Civilian Radioactive Waste Management Program, December 1998, U.S. Department of Energy, Office of Civilian Radioactive Waste Management, Washington, D.C.

[2] *INS* v. *Chadha*, 103 S. Ct. 2764 (1983)

[3] *Indiana Michigan Power Company, et al*, v. *Department of Energy and United States of America*, 88 Fed 3d 1272, 1277 (D.C. Cir. 1996), the court held that the Department of Energy had an unconditional obligation to move spent nuclear fuel by January 31, 1998. As of today, the earliest DOE could be ready to receive fuel would be 2010.

Emmit George, the Chairman of the National Association of Regulatory Utility Commissions' (NARUC) subcommittee on nuclear waste disposal, put it best when he concluded:

> "Ratepayer funds paid into the Nuclear Waste Fund are clearly not being used for their intended purposes, further impeding progress on the high-level waste disposal program."

The simple fact is that much of the money being collected from hundreds of thousands of consumers of electricity generated by nuclear power is being diverted to pay for completely unrelated projects. Put another way, the Nuclear Waste Fund has been used to help balance our budget or to artificially increase the surplus.

As a result, two major issues have arisen relative to this program and the Nuclear Waste Fund. First, the government has not performed its side of the bargain. DOE did not begin accepting nuclear fuel for long-term disposal by February 1998 as it was contractually obligated. In fact, the DOE has fallen at least 12 years behind in meeting its legal requirements.

And second, full access to the fund for appropriation has been difficult because expenditures from the fund have been subject to the spending limitations of the Budget Enforcement Act. Although the NWF has a $8.6 billion-dollar surplus, the Administration and Congress have not been able to fully fund the program due to current budget restrictions.

As Congress has attempted to reform the budget process regarding used nuclear fuel, several pieces of legislation have been considered. Each time these reforms were considered, there was a tendency to consider changes which included a mechanism to increase fees to make up for the procedurally produced shortfall in appropriations. In essence, the consumers of electricity generated by nuclear power would have to pay even more to subsidize unrelated federal spending. The bill this subcommittee is currently considering, The Taxpayers Defense Act would provide a degree of protection against arbitrary fee increases for the consumers of electricity generated by nuclear power.

Congress should make every effort to ensure that increases in fees such as the NWPA millage fee are not easily increased. The fee that supports the NWF should not be increased without the express consent of both houses of Congress. The approach embodied in The Taxpayers Defense Act is sane and sensible public policy and should govern the way that the nuclear industry's millage fee is increased.

PAYING FOR MORE THAN OUR OWN REGULATION BY THE NRC

Yet another user fee, this time intended to cover the costs of NRC regulation of nuclear facilities, dramatically impacts the nuclear industry.

Nearly all of the operating costs of the Nuclear Regulatory Commission are currently assessed as user fees paid by that agency's hundreds of licensees. Since nuclear power plants are the most significant of those licensees, the 103 nuclear power reactors currently in service pay nearly 90 per cent of the Nuclear Regulatory Commission's budget. The portion of this year's NRC budget to be paid by its licensees is $448.4 million.

The process used by the NRC to collect its user fee is somewhat unique in our government. Congress starts the process by appropriating the NRC's budget for the coming fiscal year. The following spring, the NRC issues a rule, published in the Federal Register, to collect the necessary fees from its licensees. That rule is formally adopted several weeks later, and the fees are paid before the end of the fiscal year. Then the process begins anew for the next fiscal year.

Nuclear licensees have not always paid the entire cost of their regulation. The user fee started at 33 percent and was ultimately raised to nearly 100 percent as part of the Omnibus Budget Reconciliation Act of 1990. As is apparent from the title of that legislation, the user fee was raised in 1990 to help balance our budget.

That change has had some unintended consequences. Although most of the resources and staff at the NRC are dedicated to the regulation of its licensees, the NRC funds several programs that are not directly related to that goal. These programs include some international activities as well as the agreement state oversight program and others. In a report sent to Congress earlier this year, the NRC acknowledged that these programs cost approximately $50 million annually.

It is one thing for a user fee to pay for services that are received by the user. It is quite another for a user fee to pay for general programs that more appropriately should be supported by general revenues. Once again, fees from the nuclear industry are being used not for their intended purposes but to help balance our nation's budget or to increase the surplus.

As is the case with the Nuclear Waste Fund, current congressional budget rules stand in the way of an appropriate and fair resolution of this issue. Because the user fee offsets the appropriation to the Nuclear Regulatory Commission, limiting that fee to support only direct services would force appropriators to find funding for the exempted programs under already tight discretionary spending caps.

The Taxpayers Defense Act would help solve this problem. By defining a tax as a mandatory payment of money to the extent such payment does not compensate the Federal government or other payee for a specific benefit conferred directly on the taxpayer, the Taxpayers Protection Act would change the process for implementing the NRC's user fee.

Because that legislation requires that any rule raising a tax be approved by Congress, the NRC would be mandated, under the provisions of section 816 of the bill, to send its fee rule to Congress to be approved under the expedited procedures of this legislation. This will force the NRC and Congress to take a closer look at whether it is appropriate to collect user fees for services that are not directly related to the industry's regulation.

The Taxpayers Defense Act may also help resolve a somewhat different concern of the nuclear industry regarding the NRC's user fee. The NRC actually collects two types of user fees from licensees. The first are fees that are charged when a direct service is provided to a licensee. The second is an annual fee that is levied upon all licensees and that, in effect, collects the remainder of the NRC's budget not collected from direct fees.

Under this system, the NRC collects a mere twenty percent of its budget from direct fees and the remaining eighty percent is collected from generic annual fees. The nuclear power industry strongly believes that this is contrary to sound and open budgeting. Essentially eighty percent of the NRC budget falls into a miscellaneous category, preventing it from being adequately reviewed and analyzed by the Congress and other interested parties.

Our industry hopes that legislation like The Taxpayers Defense Act will help solve this problem. The definition of a "tax" is the key issue. If the annual generic user fee does not compensate the NRC for a "specific benefit conferred directly" upon the licensee, its implementation would require Congressional approval under section 816 of the bill. We would welcome the additional oversight that the procedures of that section would provide to that portion of the NRC's budget should this be the case.

To summarize, Mr. Chairman, the nuclear industry is paying nearly $1.1 billion dollars in fees to the federal government each and every year. But, the federal government is diverting one-half billion dollars of this revenue to pay for programs unrelated to the intended purpose of those fees. Few industries are burdened with such user fees, certainly not nuclear energy's competitors. Congress needs to level the playing field. The nuclear power industry urges your subcommittee to adopt The Taxpayer Defense Act in the hope that the legislation will begin to resolve our industry's concerns over unfair taxation in the guise of user fees.

Mr. Chairman, on behalf of the Nuclear Energy Institute and our membership, I want to thank the subcommittee for this opportunity to present our views on this important issue. I welcome any questions from the members of this subcommittee.

Mr. GEKAS. We thank you, Mr. Garrish, and we turn to Mr Gerawan.

STATEMENT OF DAN GERAWAN, PRESIDENT, GERAWAN FARMS, INC., REEDLEY, CA

Mr. GERAWAN. I also thank you for the opportunity to testify today. My remarks will address so-called speech taxes imposed by the USDA to fund an array of research and promotion programs for agricultural commodities. My family grows, packs and markets peaches, plums, nectarines and table grapes in the San Joaquin Valley of California. We have led the way in several regulatory reforms affecting the tree fruit industry, most notably the regulations that eliminate size and cosmetic standards on fruit which kept tons of healthy nutritious fruit off the consumers' tables.

There are at present 22 programs that impose annual taxes of about $1 billion that are authorized but not required by Congress. The Agricultural Marketing Agreement Act of 1937 authorizes re-

search and promotion for seven commodities, four of which presently have programs including tree fruit. So-called freestanding legislation authorizes research and promotion for several other commodities such as cotton, milk and beef. All the programs operate essentially in the same manner. An industry group requests a new program. USDA holds hearings, conducts a referendum, and then implements the new program.

Over the past decade, I have paid nearly $8 million in marketing order taxes, approximately half of that went toward the speech taxes that I am testifying about today. The programs harm competition and innovation. The tax severely hampers my own advertising efforts because I must do additional advertising to counter the message that all fruit is the same and that one company's fruit is all the same as all the other fruit in the industry.

The tax also frustrates the wide range of voluntary cooperative activities which could be undertaken in pursuit of any legitimate self-interest in demand expansion or increased brand awareness. Sunkist, Ocean Spray and Sun Maid, for example, have developed world class brand recognition through voluntary cooperation as agricultural cooperatives. These programs force consumers to pay higher prices. Proponents of speech tax programs claim the programs are needed to stimulate consumer demand. To the extent that they achieve their intended purpose the end result is higher prices and potentially huge off-budget wealth transfers from consumers to special interests.

Since industries initiating a program can't increase output in the short run, the short-term effect is higher prices for the commodities which consumers want more of as a result of propaganda such as "beef, it is what is for dinner," "got milk" and "pork, the other white meat." Florida's Professor Ward, for example, has estimated that consumers annually spend $3.2 billion more for beef as a result of that industry's propaganda campaign.

Most of any benefits are captured by narrow special interests. If both producers and consumers are hurt, who then does benefit from these programs? Several groups are clear beneficiaries, lawyers and lobbyists who promote and protect the programs, advertising agencies and media, economists who are paid to "prove" the program is beneficial, board managers, staffs, and contractors who administer and support the programs. USDA basically delegates administration of the programs to the industry boards and merely rubber stamps their decisions.

USDA has never overruled an industry committee or board on a matter of advertising. Recent media exposes concerning the lack of accountability of the National Dairy Board and lavish entertaining by Cotton, Inc. are examples of the waste that inevitably results from USDA's non-existent oversight. Industry boards fail to protect minority rights. Industry boards tax and spend simply because they can. Over time all of the voluntary check off programs have become mandatory. I have no power to opt out or to choose either the messenger or the content of the generic message.

Indeed, since the messages tend to dilute my own advertising efforts, I have to spend more money just to distinguish my own brand and to counteract the mediocre generic message that all tree fruit is alike. To illustrate the absurdity of my position, imagine

how long Apple Computer would tolerate a 30% tax on its net profits to fund an industry-wide generic program encouraging consumers to simply buy more computers.

Taxes will likely increase without Congressional review. These programs tend to develop their own institutional inertia with USDA rubber stamping industry board decisions, and no meaningful judicial or administrative restraint on the narrow special interest that arguably benefit from these programs. The USDA imposed taxes will likely expand without intervention by Congress with its potentially greater accountability to producers and consumers. The economists get paid by these programs to study these programs, and then they make exaggerated and insupportable claims regarding the effectiveness of the programs claiming returns of investment of up to seven fold.

If true or even partly true, there is a built in structural incentive to continue taxing and spending until the marginal return equals the marginal cost. The best example of rampant expansion can be seen in dairy. Only 6 years after the initial program began in 1984, USDA began the fluid milk program that nearly doubled total dairy expenditures. In conclusion, USDA taxes my production, and now raises over $1 billion annually, to fund generic industry-wide promotion and research activities. These programs harm me and all producers by increasing costs without providing much chance at increased long run returns.

[The prepared statement of Mr. Gerawan follows:]

PREPARED STATEMENT OF DAN GERAWAN, PRESIDENT, GERAWAN FARMS, INC., REEDLEY, CA

My name is Dan Gerawan,[1] President of Gerawan Farming, Inc. Thank you Chairman Gekas for the opportunity to testify before the Subcommittee on the need for effective Congressional oversight over agency-imposed taxes. The Framers granted the power to tax to Congress, not to runaway agencies who are all too often "captured" by the industries they regulate. Agencies' narrow-minded pursuit of programs and goals may provide some benefits to the favored few or to special interests, often over-looking hidden costs and the broader public good. Taxation without representation fueled the Revolution and it has no place in our great democratic republic. The limited and awesome power to tax must be exercised only by Congress. My remarks today will address so-called "speech taxes" imposed by USDA to fund an array of research and promotion programs for agricultural commodities. I will briefly explain the history of these programs, the harmful effects of the tax on my company, and the special needs for Congressional oversight of these taxes.

I. GERAWAN FARMING IS A SUCCESSFUL FAMILY BUSINESS.

I am the President of Gerawan Farming, a family-owned company that grows, packs, and markets peaches, plums, nectarines, and grapes in the San Joaquin Valley, California. Gerawan is one of the largest tree fruit growers in the world. Our company was founded in 1938. We now farm several thousand acres and employ several thousand workers. We have led the way in almost every regulatory reform affecting the tree fruit industry: (1) eliminating the requirement that the maturity of fruit be judged against arbitrary and subjective paint store color chips (without regard to sugar content, shipping characteristics, or consumer needs); (2) eliminating size and cosmetic standards which kept tons of healthy nutritious fruit off consumers' tables; (3) relaxing restrictions on pack and container size and shape to provide the trade with greater flexibility in meeting consumer needs; and (4) working with USDA as a pioneer in its Partners in Quality (PIQ) program under which companies that comply with rigid quality assurance procedures are exempt from continuous on-site federal and state inspections. Gerawan was the first company to qualify

[1] Pursuant to House Rule 11, clause 2(g)(4), Gerawan Farming has not received any federal grant, contract, or subcontract within the past two years.

for the PIQ program in our industry. We have been repeatedly recognized in the media as the industry leader in regulatory reforms designed to prevent the government-mandated waste of food and to remove regulations that needlessly drive up the cost of food, especially for the poor, with no real benefit to the industry or public at large. We are light years ahead of our competitors in innovative farming, packing, and marketing technologies that regularly earn our brand, Prima, a significant above-market premium, and our employees a well-deserved reputation for consistent high quality. In turn, we pay above-market wages, and are the preferred employer in our area. Through a newly opened community outreach center, and in Spanish language advertising, we provide a wide range of information on worker rights and on federal and state assistance programs.

II. HISTORY OF THE SPEECH TAX PROGRAMS.

There are at present 22 programs that impose annual taxes of about $1 billion, authorized but not required by Congress. The Agricultural Marketing Agreement Act of 1937 authorizes research and promotion for seven commodities, four of which presently have programs, including tree fruit. So-called "free standing" legislation authorizes research and promotion for cotton,[2] dairy,[3] fluid milk,[4] beef,[5] eggs,[6] pork,[7] wool and mohair,[8] sheep,[9] soybeans,[10] honey,[11] mushrooms,[12] limes,[13] pecans,[14] popcorn,[15] canola oil,[16] kiwifruit,[17] potatoes,[18] flowers,[19] wheat,[20] and watermelon.[21] The Commodity Promotion, Research, and Information Act of 1996, part of FAIR, provided additional generic authority for any agricultural commodity. New programs for blueberries and peanuts are presently pending before USDA.

All of the programs operate in essentially the same manner. An industry group requests a new program. USDA holds hearings to devise the specific provisions, ultimately incorporated into a regulation called an order, conducts a referendum, and implements the new program. Each program is administered by an industry board composed of from 12 to over 100 members. These boards implement the research and promotion activities through staff or, for larger programs, independent contractors such as advertising agencies.

The programs generally must be terminated by the Secretary whenever he finds they are ineffective or contrary to statutory intent. They can also be terminated by referendum of the participants, usually producers. Several of these increasingly controversial programs have been recently terminated, including pecans, plums, sheep, and flowers. We led the fight to terminate the federal plum program in 1991, which was successful only because USDA was required by court order[22] to make its voter lists available so that opponents would have a reasonable chance at a fair proxy fight.

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[2] Cotton Research and Promotion Act of 1966, 7 U.S.C. § 2101.
[3] Dairy Production Stabilization Act of 1983, 7 U.S.C. § 4501, et seq.
[4] Fluid Milk Promotion Act of 1990, 7 U.S.C. § 6401, et seq.
[5] Beef Promotion and Research Act of 1985.
[6] The Egg Research and Consumer Information Act of 1974, 7 U.S.C. § 2701, et seq. The tax of $0.10 per 30 dozen eggs (producers with less than 75,000 hens exempt), raises about $14 million annually.
[7] Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. § 4801, et seq.
[8] National Wool Act of 1954.
[9] Sheep Promotion, Research, and Information Act of 1994, 7 U.S.C. 7101, et seq.
[10] Soybean Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6301, et seq.
[11] Honey Research, Promotion, and Consumer Information Act, 7 U.S.C. 4601, et seq.
[12] Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101, et seq.
[13] Lime Research, Promotion, and Consumer Information Act, 7 U.S.C. 6201, et seq.
[14] Pecan Promotion and Research Act of 1990, 7 U.S.C. 6001, et seq.
[15] Popcorn Promotion, Research, and Consumer Information Act, 7 U.S.C. § 7481.
[16] Canola and Rapeseed Research, Promotion, and Consumer Information Act, 7 U.S.C. § 7441, et seq.
[17] National Kiwifruit Research, Promotion, and Consumer Information Act, 7 U.S.C. § 7461, et seq.
[18] Potato Research and Promotion Act, 7 U.S.C. 2611, et seq.
[19] Floral Research and Consumer Information Act, 7 U.S.C. 4301, et seq. (never implemented); Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act, 7 U.S.C. 6801, et seq. (terminated by referendum).
[20] Wheat and Wheat Foods Research and Nutrition Education Act, 7 U.S.C. 3401, et seq.
[21] Watermelon Research and Promotion Act, 7 U.S.C. 4901, et seq.
[22] See Cal-Almond v. USDA, 960 F.2d 105 (1992); Ivanhoe Citrus Asso. v Handley, 612 F Supp 1560 (D.D.C., 1985).

III. THE SPEECH TAX HARMS GERAWAN FARMING.

Although the annual tax of approximately $0.20 per 25-pound carton[23] doesn't sound like much, it adds up very fast. Over the past decade, Gerawan has paid nearly $8 million in marketing order assessments, approximately $4 million of which was for the research and promotion program. The remainder of the tax funds the other activities of the industry administrative committee, including inspection and administration.

a. The programs promote mediocrity and destroy diversity. The generic message of the tree fruit program—similar to all programs—urges consumers to buy California summer fruits because they're sweet and delicious. One television spot featured two actors sensuously eating fruit while moaning in apparent sexual pleasure. I and many others found such blatant pandering totally offensive. Such promotion of the "California" brand is completely contrary to the quality, image, and distinction of our Prima brand.

b. The programs harm competition and innovation. The tax—a significant percentage of Gerawan's net revenue—severely hampers our own advertising. We must do additional advertising to counter the message that one piece of fruit—and one company—is as good as another. In addition, we could spend the tax money on our own research, advertising, modernization, debt reduction, salaries, etc. The tax also frustrates the wide range of voluntary cooperative activities, including voluntary "check off" programs, which could be undertaken in pursuit of any legitimate self-interest in demand expansion or increased brand awareness. Sunkist, Ocean Spray, and Sun-Maid, for example, have developed world-class brand recognition through voluntary cooperation as agricultural cooperatives.

c. The programs don't help. Supporters of these programs make wild claims about their effectiveness, but they're all false, irrelevant, or based on "voo doo" economics. Economists that are paid by the industry boards use fancy statistical models to claim that virtually anything beneficial in the industry is a result of the generic advertising program, while placing "blame" for any adverse results on "externalizes," Acts of God, or currency fluctuations. These models, for example, totally neglect the beneficial effects of the branded advertising and self-promotion by individual firms, or worse, lump these benefits in with the generic program.

IV. THE SPEECH TAX HARMS THE PUBLIC IN GENERAL.

As I've explained above, the speech tax imposes unreasonable costs on my company, promotes mediocrity, interferes with free choice, and undermines my competitive advantages—with no offsetting benefits.

a. These programs force consumers to pay higher prices. Proponents of speech tax programs claim they are needed to stimulate consumer demand. To the extent they achieve their intended purpose, the end result is higher prices and potentially huge off-budget wealth transfers from consumers to special interests. Since industries initiating a promotion program can't increase output in the short run (it takes 8–10 years for newly planted fruit trees to reach full production), the short-term effect is higher prices for the commodities which consumers "want" more as a result of propaganda such as "beef, it's what's for dinner," "got milk," and "port, the other white meat." Florida's Professor Ward, for example, has estimated that consumers annually spend $3.2 billion more for beef as a result of that industry's propaganda campaign.

b. Producers don't benefit. The tax increases the cost of production. But producers will generally not be able to pass these increases costs up the commodity chain. Producers will increase output in the long run in response to real or perceived increases in consumer demand and/or prices. While an industry may increase total output in the long run, individual producers are most likely worse off in economic terms because the return per unit of resource input (profit) is offset by the increased costs imposed by the tax.

Thus, the most likely economic consequence of these programs is a dynamic disequilibrium, or treadmill effect. Promotion causes higher prices, which in turn causes increased output (reducing long run producer returns), which in turn encourages industry boards to increase promotion spending—to "grow" the industry out of the whole. Since the implementation of the initial dairy promotion program in 1984, for example, consumer prices for milk have steadily increased, producer returns have steadily decreased, and total promotional expenditures have more than doubled.

[23] See 7 C.F.R. §§916.45, 917.45.

c. Most of any benefits are captured by narrow special interests. If both producers and consumers are hurt, who, then, does benefit from these programs? Several groups, although narrow special interests, are clear beneficiaries: lawyers and lobbyists who promote and protect the programs, advertising agencies and media, economists who are paid to "prove" the programs beneficial, board managers (most of whom make more than the Secretary of Agriculture), staffs, and contractors who administer and support the programs, and retailers.

d. USDA's benign neglect encourages waste and corruption. USDA basically delegates administration of the programs to the industry boards and merely "rubber stamps" their decisions. USDA has never overruled an industry committee or board on a matter of advertising. Recent media exposes concerning the lack of accountability of the National Dairy Board and lavish entertaining by Cotton, Inc. are examples of the waste that inevitably results from USDA's non-existent oversight.

V. CONGRESSIONAL APPROVAL AND OVERSIGHT IS NECESSARY.

The proposed bill is necessary to protect producers and consumers from USDA's effectively unchecked taxing power.

a. Industry boards fail to protect minority rights. Industry boards tax and spend simply because they can. Over time all of the voluntary "check off" programs have become mandatory. Gerawan, and any firm who would otherwise prefer to spend its own money on its own projects, is labeled a "free rider," a suggestively evil designation, and forced to participate in the collective generic program. I have no power to opt out or to choose either the messenger or the content of the generic message. Indeed, since the messages tend to dilute my own advertising efforts, I have to spend more just to distinguish my own brand and counteract the mediocre generic message that all tree fruit is alike. To illustrate the absurdity of my position, imagine how long Apple Computer would tolerate a 30% tax on its net profits to fund a industry-wide generic program encouraging consumers to simply buy more "computers."

b. USDA provides little oversight and control. I can't look to USDA for much help. After all, what do USDA bureaucrats know about the unique aspects of advertising each commodity—at least compared with the supposedly knowledgeable industry boards?

c. The speech tax violates the First Amendment. A mandatory tax that forces me to support a message with which I disagree, spread by a messenger I cannot choose, and totally lacking any arguable justification on public health or safety grounds, violates my First Amendment rights to remain silent, to choose when and how to speak, and to select my preferred messenger. Unfortunately, the Supreme Court did not quite agree. In a bitterly divided 5–4 opinion, the Court upheld the tree fruit speech tax in Glickman v. Wileman, 521 U.S. 457 (1997). The Court concluded that the program was merely a species of economic regulation, part of a comprehensive scheme displacing competition with regulation under the AMAA, not entitled to any special protection under the First Amendment. The four dissenters (Souter, Scalia, Rehnquist, and Thomas) convincingly demonstrated that the speech tax is a classic First Amendment violation. Hopefully, this decision will be quickly reversed or distinguished.[24]

d. Taxes will likely increase without Congressional Review. As explained above, these programs tend to develop their own institutional inertia due to the expanding supply chasing demand regulatory "treadmill," USDA "rubber stamping" industry board decisions, and no meaningful judicial or administrative restraint on the narrow special interests that arguably benefit from the programs. The USDA imposed taxes will likely expand without intervention by Congress with its potentially greater accountability to producers and consumers. The economists that study these programs make exaggerated and insupportable claims regarding the effectiveness of the programs, claiming returns on investment of up to seven fold. If true, or even partly true, there is a built-in structural incentive to continue taxing and spending until the marginal return equals the marginal cost. Several programs have been authorized by Congress but not yet implemented, and the 1996 FAIR Act authorized new programs for any agricultural commodity not previously listed. The best example of

[24] This unfortunate decision was the produce of an ill-fated coin toss rather than any weakness in our position on the merits. A labor lawyer from Fresno, Tom Campagne, who represented one of the sixteen plaintiffs, with no Supreme Court experience, won the Clerk's coin toss and elected to argue instead of my nationally renowned First Amendment and Supreme Court expert, Michael McConnell. Campagne wrongly conceded at oral argument that generic programs in general did not violate the First Amendment and that the long-standing dispute in the tree fruit industry was more over administrative matters than about Constitutional rights.

rampant expansion can be seen in dairy. Only six years after the initial program began in 1984, USDA began the fluid milk program (imposing a tax on dairies) that nearly doubled total dairy expenditures.

VI. CONCLUSION.

USDA taxes my production, and now raises over $1 billion annually, to fund generic industry-wide promotion and research activities. These programs harm me and all producers by increasing costs without providing much chance at increased long run returns. They harm consumers by imposing huge off-budget wealth transfers and needlessly stimulate demand for mature well-known products. Society as a whole is harmed by reduced innovation, inefficiency, and waste. Congress must intervene and reclaim the power to tax—with representation. Hopefully, these programs will then be phased out with free choice—and free speech—restored to the tree fruit and other affected industries.

Thank you very much for the opportunity to testify today. I would be pleased to answer any questions from the Committee.

Mr. GEKAS. We thank you, Mr. Gerawan. It occurred to me that the strongest theme in your entire message is that all of this translates into higher prices and then ultimately it is the consumer who bears the brunt of all these hidden costs and taxes and fees, etc.

Mr. GERAWAN. That is correct.

Mr. GEKAS. And primarily what we are trying to do here is to let the consumers know and the taxpayers that indeed if the Congress votes to provide funding for a particular service that it should be the Congress to do it, not the agencies through these various mechanisms, some of which you have described.

Mr. GERAWAN. Exactly. There is a need for someone to look out for the interests of the consumers, something the agencies don't necessarily do.

Mr. GEKAS. And, Mr. Garrish, you do not complain about the fees that have to be paid or the administrative cost portion, you complain rightfully about the excess being used for other funding purposes or deficit reduction or other motivations on the part of the Congress.

Mr. GARRISH. Yes, sir. Our motivation is not against the fees. We understand that someone has to pay these fees and it is appropriate that the users, for instance, of nuclear power pay the fees that are necessarily associated with it. We think though we would like to get some service for it. That is one of our fundamental problems right now. In addition to that, the increases we think need to be really dealt with by the Congress, not by the agency. It is just too easy, right now, for the agency to say, "Let's just raise the fee." We need to have some protection in the manner in which that is done. But there is no objection to the payment of the fees.

Now these fees are paid by America's nuclear electrical users. It is not paid by the utilities. These are passed on to consumers obviously. $42 billion for the Nuclear Waste Fund comes from somewhere, and it comes from America's nuclear customers.

Mr. GEKAS. Just like Mr. Gerawan said——

Mr. GARRISH. Exactly.

Mr. GEKAS. Ultimately it comes down to the consumer. Mr. Joyce, do you have any time table that you can predict on a ruling by the Appeals Court?

Mr. JOYCE. It is long overdue. The problem has been the FCC has continued to revise its universal service rules so parties have been continuing to inundate the fifth circuit with miscellaneous filings and such. The last correspondence we got from the court sug-

gested they are pretty much fed up with receiving all this paper so I would expect a decision in about a month or two.

But if I might add, Mr. Chairman, that it underscores a concern we have in response to Mr. Nadler's comments about using the judicial process to try and flush out the differences between taxes and regulatory fees. I am not a legislative expert and I don't know if your bill is the best way to cure this problem but I am an administrative law practitioner and I do know that judicial process certainly has not been the best way to flush this out.

This has been 2 years now that this appeal has been pending. We started in front of the FCC and now it is in front of the fifth circuit. Two years, eight quarterly filings, an enormous administrative undertaking to do a program that is at least arguably unconstitutional. We may win, we may lose. If we prevail, it is going to be a nightmare to unscramble this egg, an absolute nightmare. And this case is telling in a lot of other respects. Who filed this appeal? Did the major phone companies file this? Did the major telephone companies file this? Did even the major trade associations file this appeal? None of them did. None of them did.

One insignificant paging company in Puerto Rico has challenged the constitutionality of this. If they didn't do that, all of your constituents would be paying this fee. They may complain about it, they might say this seems like a tax, but those rules would have gone into effect unperturbed, unchallenged as unconstitutional. So from where I sit, there ought to be a better way to flush out these that are really taxes before it gets to the point where somebody has to challenge them in court.

Mr. GEKAS. We thank each member of the panel. Does the gentleman have any questions? And we now stand in recess pending the registering of the votes on the floor of the House. We will return and begin this next panel at 11:25.

[Recess.]

Mr. GEKAS. The hour of 11:25 having arrived, the committee will come to order pursuant to the rules of the House. As we reiterated time and time again, a hearing cannot proceed without the presence of a quorum for such hearing, namely two members. As you can see, there is only one in attendance at this juncture. We will be constrained to recess until the appearance of another member.

If we have difficulty in mounting that quorum, I am going to suggest to the witnesses that we will receive their written statements for the record and we can engage in an informal colloquy among and between the members and the Chair which then would be converted by the Chair into a full statement of the meaning of the oral testimony to supplement the written testimony and the questions and answers that might be propounded and that, too, then would be included in the record. It is the only way that I can fashion a system in which you will not be wasting your time while I am wasting my time. We hope that another member appears shortly. So we will wait an appropriate decent interval and then proceed along the lines that I have outlined. The committee stands in recess.

[Recess.]

Mr. GEKAS. For the benefit of those in the audience, Tom Schatz is President of Citizens Against Government Waste, and the Coun-

cil for Citizens Against Government Waste. Prior to joining Citizens Against Government Waste in 1986, he was legislative director to our former colleague, Hamilton Fish. Mr. Schatz holds a law degree from George Washington University and he graduated from the State University of New York at Binghamton with a honor's degree in political science.

He is joined at the witness table by Matthew Ames, a member of the Miller & Van Eaton law firm here in Washington. He represents EDLINC, the Education and Library Networks Coalition. His practice areas include cable franchising, information technology contracts, fifth amendment law, Eastern European trade, and property rights. Mr. Ames attended the College of William and Mary, BS, 1980, and received his law degree cum laude from Georgetown.

Jim Miller is counselor at Citizens for a Sound Economy. He was director of the Office of Management and Budget in the Reagan administration and a member of the President's cabinet. He has served also as vice chairman to the Administrative Conference of the United States. With that then we will begin with the testimony of Mr. Schatz or, shall we say, a summary of his testimony.

Mr. SCHATZ. Would you like me to summarize the oral statement I was going to give as quickly as possible, Mr. Chairman?

Mr. GEKAS. Feel free to deliver what you want at least the Chair and counsel for the minority to hear.

STATEMENT OF THOMAS A. SCHATZ, PRESIDENT, CITIZENS AGAINST GOVERNMENT WASTE, WASHINGTON, DC

Mr. SCHATZ. Thank you very much, Mr. Chairman. I appreciate the opportunity to address the subcommittee. We believe that your bill, the Taxpayer's Defense Act, addresses a matter of the utmost urgency which is to prevent unelected bureaucrats from imposing taxes on the American people. It is clear under the Constitution that Congress has the sole authority to lay and collect taxes, duties, and excises. And certainly the founding fathers intended this to be the case as well. I cite Alexander Hamilton in the Federalist Papers in my written statement, and I will leave that quote in there.

Clearly, they were making it extremely clear and concise that Congress had this sole power. There are several examples now of bureaucrats, unelected bureaucrats and agencies, raising taxes. And in a discussion during the recess with Mr. Harper, I did look at the definition that you have in your bill of what is a tax versus what is a fee, and it seems very logical that a fee, if it is used for the purposes for which it was intended, is just that, it is a fee. And I don't think your bill is addressing whether or not agencies have the ability to levy fees to cover the expenses of the various programs under their jurisdiction and control, but that if they have money coming in that they use away from those purposes that that would be considered a tax.

For example, the Nuclear Regulatory Commission does charge the industry for, in essence, its own existence and the matters that are covered domestically are certainly appropriate. But when that money is used for overseas activities, for activities not related to the purposes to regulate the industry, that then does constitute a tax. We also, of course, have the situation with the E-rate tax,

which many call the Gore tax, where the money in fact may even be unconstitutional in terms of its receipt by the Federal Communications Commission.

The recent increase in that tax by $1 billion and the fact that the FCC has also decided that they don't want the phone companies to let the American people know that this fee is being imposed, that it is coming through and people will no longer know about it sounds to me like the FCC has something to hide. Your bill would prevent agencies from directly establishing or raising taxes, but it would also give them the opportunity to come to Congress with their proposal and allow Congress to make a decision about what to do about that particular fee.

We also have the Internet Corporation for Assigned Numbers and Names or ICANN. The stated objective of this organization was to facilitate the transition of the domain name system to the private sector from U.S. government oversight. ICANN doesn't have members yet and its unelected interim board recently proposed a $1 tax for every registrant in order to fund its $5.9 million first year operating budget, which is already facing a shortfall.

This decision was shielded from the public. Meetings were held in secret. They have withdrawn this proposal because of public pressure and Congressional concern, but ICANN really is already acting like the government instead of the private sector. Instead of cutting its expenses to meet its budget, it attempted to increase revenues, and the Department of Commerce wasn't as much concerned about the legality of the taxes. It was worried about a public relations problem.

One of your witnesses earlier mentioned the Nuclear Waste Fund and I know that is not precisely the focus but the fact is that this is also of some concern.

Mr. GEKAS. If the gentleman will suspend for a moment, we acknowledge the attendance now of the gentleman from Massachusetts, Mr. Meehan, whose presence now constitutes a quorum along with the Chair so from here on in the reporter will make certain that every word becomes a part of the record. Mr. Schatz, you may continue.

Mr. SCHATZ. Mr. Chairman, I again thank you for the opportunity to testify and I would like to briefly summarize my statement. Citizens Against Government Waste believes that the Taxpayer's Defense Act addresses a matter which concerns every taxpayer, the ability of unelected bureaucrats to impose taxes on the American people. This is clear under the Constitution that only Congress has this authority. And we have several examples now of Federal agencies and unelected bodies imposing taxes, including the Federal Communication Commission and its E-rate tax, the Internet Corporation for Assigned Numbers and Names in its attempt to impose a $1 tax on the registrants on the Internet, and finally the Nuclear Regulatory Commission which imposes fees on the industry and then takes that money and uses it for other purposes.

The Taxpayer's Defense Act would restore constitutional balance and authority and require Congressional approval for any rule that raises or establishes a tax before that rule can take effect. This would prevent agencies from directly establishing or raising taxes

and give them an avenue to advance proposals to Congress. The American people already suffer from excessive taxation without representation, both under the universal service tax which was recently increased by $1 billion, and the Federal Communication Commission's effort to prevent phone companies from itemizing this tax on phone bills. This is an admission that what they are doing cannot stand the light of day.

The Internet Corporation for Assigned Numbers and Names or ICANN tried to propose a $1 tax on every registrant to fund its $5.9 million budget. However, they withdrew the proposal because of concern from Congress and the public. Instead of cutting their expenses and budget they were increasing fees, acting a lot more like the government than a private sector organization.

The Nuclear Regulatory Commission provides fees or imposes fees on the industry by constitutional and Congressional authority, but the money that is used for purposes other than what is in the statute should be considered a tax and not a fee. Of course, they have the $16 billion in the Nuclear Waste Fund which has also not been used for its intended purposes.

These are just a few examples of bureaucratic taxation that turn our systems of checks and balances on its head. Your bill, Mr. Chairman, would restore the constitutional balance and return control of all taxes where everyone agrees it should and must be, in Congress. In order for an agency to establish or raise taxes it must submit a proposal to Congress and gain approval. This will require the agency to justify the imposition of a new tax or an increase in an existing tax. If it cannot be justified, it should not be enacted.

The Congressional authority on this is clear and Members of Congress are a lot closer to the needs of the American people than bureaucrats. The Taxpayer's Defense Act protects the interests of taxpayers and promotes accountability on the part of political leaders and Federal agencies, reduces hidden taxes and ends taxation without representation. Thank you, Mr. Chairman. I will be happy to answer any questions.

[The prepared statement of Mr. Schatz follows:]

PREPARED STATEMENT OF THOMAS A. SCHATZ, PRESIDENT, CITIZENS AGAINST GOVERNMENT WASTE, WASHINGTON, DC

Mr. Chairman, members of the subcommittee, thank you for the opportunity to testify today. My name is Thomas A. Schatz. I am president of Citizens Against Government Waste, a 600,000 member nonprofit organization dedicated to eliminating waste, fraud and abuse in government. Citizens Against Government Waste has not received at any time any federal grant and we do not wish to receive any in the future.

Citizens Against Government Waste (CAGW) believes the Taxpayer's Defense Act addresses a matter of the utmost urgency—preventing unelected bureaucrats from imposing taxes on the American people.

Article 1, Section 8 of the Constitution clearly states: "The Congress shall have power to lay and collect taxes, duties, imposts and excises."

With this concise sentence, the founding document of our government clearly states that Congress alone has the power to tax.

The interests of the taxpayer have always been of paramount concern in this country. The American Revolution was fought in part to ensure our right to be free from burdensome and unfair taxation. The events leading up to that war and the Declaration of Independence generated the seminal phrase "No Taxation Without Representation"—a statement as valid today as it was more than two centuries ago.

There is no governmental action that has as profound an impact on the common person as taxes. Today, the tax burden on our economy is the highest in peacetime

history. The average American family pays more in taxes than on food, clothing and shelter combined. With taxes robbing us of so much of our annual income, Americans cannot help but be concerned about why they are being taxed and by whom. Involved in this concern is the desire to ensure that the taxes that are imposed are fair, equitable and just. Taxes that are imposed by governmental agencies without the authority of Congress do not meet these criteria. Without congressional approval of a taxing policy, there is little oversight on agencies imposing unauthorized taxes, which leaves the door wide open for abuses of power.

In the words of Alexander Hamilton in the Federalist Papers #36:

> There is no part of the administration of government that requires extensive information and a thorough knowledge of the principles of political economy so much as the business of taxation. The man who understands those principles best will be least likely to resort to oppressive expedients, or to sacrifice any particular class of citizens to the procurement of revenue. It might be demonstrated that the most productive system of finance will always be the least burdensome. There can be no doubt that in order to be a judicious exercise of the power of taxation, it is necessary that the person in whose hands it is should be acquainted with the general genius, habits, and modes of thinking of the people at large and with the resources of the country.

It is for precisely the reasons stated by Alexander Hamilton that Congress was granted the exclusive Constitutional power to levy taxes. As representatives of the citizens of the United States, members of Congress are in the best position to speak to the needs and desires of all Americans. As popularly elected officials, members of Congress must have some concern for how their policies affect their constituents. Knowing that they are up for re-election every two years, they are less likely to abuse their powers for fear of being turned out of office. Also, members of Congress feel some affinity toward and a sense of accountability to their constituents.

It is this lack of implicit accountability to the American people that makes giving taxation power to non-elected officials such a dangerous prospect, to say nothing of its dubious constitutionality. While an elected official must worry about being re-elected, a non-elected official doesn't have those concerns. As long as that person achieves the desired goals of his or her organization, job security is assured. These are the policy reasons for preventing bureaucrats from taxing citizens. The constitutional authorities are even more compelling.

Two recent cases have made it clear that under Article 1, Section 1 of the Constitution, lawmaking functions cannot be delegated. The Supreme Court, in 1996, declared in *Loving* v. *U.S.*, that "the lawmaking function belongs to Congress . . . and cannot be conveyed to another branch or entity." The Court also found the line-item veto to be an unconstitutional transfer of lawmaking authority to the president, and overturned the law. The line-item veto permitted the president to cut spending and eliminate taxes after bills were passed by Congress, and while one may argue with the decision, it is consistent with the *Loving* case and consistent with the provisions of the Taxpayer's Defense Act.

The problem being addressed by your legislation, Mr. Chairman, is one of Congresses' own making. The line-item veto legislation, while well intentioned, was essentially an admission that Congress could not control its own spending habits, and therefore needed help from the president. While that law was in effect, the result, while disappointing in its meager exercise by President Clinton, was in fact to reduce wasteful spending.

A more recent example of passing its duties to the executive branch is the Universal Service Tax. On May 27 of this year, the Federal Communications Commission voted to increase this tax by about $1 billion. In addition, the FCC adopted a rule that would bar telephone companies from separately itemizing this tax in order to hide its actions from the taxpayers. This is deception and subterfuge at its worst. This entire catastrophe could have been avoided if Congress had simply passed a bill that excluded the FCC from the line of decision making, and had designated the agency as the administrator of a constitutional user fee or tax to increase the number of schools with Internet access, instead of giving the FCC the ability to create the tax.

In addition to imposing a massive tax, the FCC created two nonprofit entities that the General Accounting Office has found to be unconstitutional and at risk for waste, fraud and abuse.

The Taxpayer's Defense Act would restore constitutional balance and authority by requiring congressional approval for any rule that establishes or raises a tax before said rule could take effect. This would prevent agencies from directly establishing or raising taxes, while providing them with an avenue to advance proposals to Congress.

What makes this bill so important is that the American people are already suffering from the imposition of the FCC's Universal Service Tax. Universal service—the idea that everyone should have access to affordable telecommunications services—is certainly a noble and beneficial idea. The problem arises from the effect of the 1996 Telecommunications Act on the idea of universal service.

This act allowed the FCC to extend universal service funds to provide "discount telecommunications services" to schools, libraries, and rural health facilities. This sounded reasonable, but its effect is pernicious. The Act gave the FCC the power to decide the level of "contributions"—taxes—that telecommunications companies would have to pay to support universal service. The FCC determines how much can be collected in taxes to subsidize a variety of "universal service" spending programs. It charges long-distance providers, who pass on the costs to consumers in the form of higher telephone bills.

The Universal Service Tax is problematic and harmful in many respects:

1. The Universal Service Tax is in addition to the federal excise tax on telecommunications service. Not only is it an unauthorized tax, but it is double taxation on consumers for use of a vital service.
2. The universal service system is extremely inefficient. According to Jerry Hausman of the American Enterprise Institute, every dollar raised through the Universal Service Tax winds up draining an additional $1.05 to $1.25 from the economy.
3. In a letter written to Senator Ted Stevens (R-Alaska), the General Accounting Office stated that the FCC "exceeded its authority when it directed the National Exchange Carriers Association, Inc. (NECA) to create the Schools and Libraries Corporation and the Rural Health Care Corporation. The Government Corporate Control Act specifies that 'an agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.'" Not only has the FCC decided it has the power to levy taxes, it has decided it can authorize the creation of agencies. The FCC is slowly expropriating increasing amounts of power that belong exclusively to Congress.
4. The tax is a hidden tax. Only cellular and business customers will get full disclosure of this tax. The American people are being assessed a tax that was not approved by Congress as it should have been, and are not being told about this tax. That is deception at its worst.
5. Outlays for the Universal Service Fund will rise from $1 billion in fiscal 1997 to more than $13 billion in 2003. In other words, in just five short years every household in America will be squeezed for an additional $120 annually.

There are two approaches currently under consideration by the House that would correct this usurpation of congressional authority. Rep. Billy Tauzin (R-La.) has introduced the Schools and Libraries Internet Access Act to phase out the Universal Service Tax, along with the telephone excise tax. The E-Rate Termination Act, introduced by Rep. Tom Tancredo (R-Colo.) would repeal the Universal Service Tax outright.

It should be clear that by allowing agencies to impose taxes without gaining congressional approval, Americans have become vulnerable to abuses such as those resulting from the Universal Service Tax. By requiring congressional approval for all federal taxes, the Taxpayer's Defense Act ensures that Congress will retain its Constitutional powers as intended by this nation's Founding Fathers.

According to the Federalist Papers #10, "the apportionment of taxes . . . is an act which seems to require the most exact impartiality." Congress, although far from perfect, is considerably more impartial than a self-interested federal agency. As popularly elected officials who must be accountable to their constituents, members consider many viewpoints when making policy decisions, making them more likely to advocate policies that the American people will view as beneficial, necessary and just. The government requires taxes to carry out its everyday operations and fulfill the obligations placed upon it. Both the need for some taxes and the desire among the populace to have their tax burden decreased are considered and weighed by Congress when deciding whether or not to impose a tax.

There is no chance of ever receiving that courtesy from government agencies, which are looking out for their own interests. The FCC is concerned with advancing the declared and undeclared goals of that agency. In order to achieve these goals, any and all methods that are potentially legal will be used. The FCC has proven this by twisting the provisions of the 1996 Telecommunications Act to gain the power to impose taxes. The legality of their actions is in question, but as yet has not been rejected.

Another area ripe for hidden taxes is the Internet. It has attracted another bureaucratic predator that would like to muscle in and get a piece of the action. In 1998, the Department of Commerce established the Internet Cooperation for Assigned Numbers and Names, or "ICANN." The stated objective of this new organization was to facilitate the transition of the domain name system to the private sector from U.S. government oversight. Through "consensus-based" decision-making, ICANN was supposed to establish standards by which the Internet would operate. An interim Board of Directors was supposed to establish ICANN as an open membership organization. The members would then elect the actual board and all the decisions made would involve those effected.

Unfortunately, ICANN took a detour somewhere on the road to cyberspace. ICANN has no members and the unelected "interim" board proposed a $1 tax on every registrant for a domain name in order to fund its $5.9 million operating budget. This decision was shielded from public view because its meetings were held in secret.

In addition to the tax, a letter to ICANN from the Department of Commerce underscores the importance of this hearing and your legislation, Mr. Chairman. The letter outlined several reforms that should be instituted by ICANN. Among these suggestions was the elimination of their $1 tax. However, their reason for suggesting this wasn't because it was unconstitutional or done without Congressional mandate, it was because "it is controversial." Commerce explained that while the "user fee may be determined to be an appropriate method" to fund ICANN, the "permanent financing method should not be adopted until after the nine elected members are added to the ICANN Board."

Fortunately, ICANN has withdrawn its proposed tax as a result of public and congressional concern. But it seems that Department of Commerce wasn't as much concerned with the legality of the tax as it was worried about a public relations problem.

Your bill, Mr. Chairman, would restore the control of all taxes where everyone agrees it should be—in Congress.

The Taxpayer's Defense Act provides a method of checking the power of governmental agencies. In order for an agency to establish or raise taxes, it must submit a proposal to Congress and gain Congressional approval. This will require the agency to justify the imposition of a new tax or an increase in an existing tax. If it cannot be justified, it will not be enacted. This will prevent unnecessary and detrimental taxes from being imposed by agencies.

Our government operates on a system of checks and balances to prevent tyranny. The power to tax is the power to destroy or improve our lives. In order to retain control of this awesome responsibility, it is imperative that Congress remain the only branch of the federal government with the power to levy taxes.

Mr. Chairman, the Taxpayer's Defense Act protects the interests of taxpayers. It promotes accountability on the part of political leaders and federal agencies, reduces hidden taxes, and ends taxation without representation.

Mr. GEKAS. Thank you very much. We turn to Mr. Ames.

STATEMENT OF MATTHEW C. AMES, ESQUIRE, MILLER & EATON, P.L.L.C., WASHINGTON, DC, REPRESENTING EDLINC, THE EDUCATION AND LIBRARY NETWORKS COALITION

Mr. AMES. Thank you, Mr. Chairman. First of all, I would like to express my appreciation for the privilege, the opportunity to come here and appear before you today. As you noted earlier, I am here on behalf of EDLINC, which is an alliance of over 30 national education and library organizations, including the National Association of Independent Schools, the U.S. Catholic Conference, the NEA, the National School Board Association, the American Library Association and many others. I would also like to thank the chairman for your sentiments at the outset when you made some statements regarding the E-rate which is fundamentally why I am here.

I think you touched on some of the points that I am going to make and acknowledged, I think, ultimately the lawfulness of the program as it exists. The E-rate is a clear example of a Federal agency taking a Congressional mandate and implementing it fully

and appropriately under the law. I think there has been a certain amount of misunderstanding of what the FCC has done and I would like to make a few points about that.

First of all, universal service, the E-rate is part of a broad universal service program. Universal service is not new. Universal service has existed for decades and the fundamental point has been that this country is one Nation and we need to expand the reach of the telecommunications network so that people in rural areas can have access and other high cost areas can have access to affordable telecommunication services and all Congress did in the 1996 act was direct the FCC to re-establish in the course of reorganizing the telecommunications industry, re-establish universal service and also to add on additional benefits that had not existed before for schools and libraries.

What has changed is that we now have service for schools and libraries and that in the past those costs, the costs of universal service, were embedded in service rates so nobody knew they were there and now those costs are being broken out. The fundamental policy behind the E-rate, the universal service for schools and libraries, is to insure that every school child has the opportunity to learn how to use this powerful new tool of the Internet and advanced telecommunications and has access to that information so that people who are in disadvantaged areas, disadvantaged for financial reasons, don't fall further behind than they already are.

Basically people shouldn't have to move to the big city to get all the benefits of modern technology. That is the concept behind it. What I would like to do now is do something that—incidentally, EDLINC has put out this book with the support of Bell Atlantic which details a number of instances where the program has been very beneficial.

Mr. GEKAS. If the gentleman wants that to become part of the record, we will——

Mr. AMES. I would be delighted.

Mr. GEKAS. With unanimous consent enter it into the record along with a package of the written statements to which I alluded before.

[These materials are on file with the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary.]

Mr. AMES. Thank you very much, Mr. Chairman. I appreciate that. The other thing I would like to do is do something no one else has done today and that is to briefly read a couple of excerpts from the statute. This is the Communications Act, as amended by the 1996 Telecommunications Act, and I am going to read section 254. That is the universal service provision, subsection (h)(B), which refers to telecommunication services for educational providers and libraries.

And that section says that all telecommunications carriers serving in geographic areas shall upon a bona fide request for any of its services that are within the definition of universal service, and then it refers to another subsection, provide such services to elementary schools, secondary schools and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. That says that Congress directed the FCC to set up a program so that schools and libraries would get discounts

on rates or telecommunication services. I don't think anybody disputes that.

Then a little bit further down in subsection (h)(2)(a), which is titled advance services, the commission is directed by Congress, the commission shall establish competitively neutral rules to enhance to the extent technically feasible and economically reasonable access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers and libraries.

The question here is what is advanced telecommunications and information services. Clearly, the Internet is advanced telecommunications and information services so Congress directed the FCC to do that. Congress also said that those services need to be available to classrooms and that means that the internal wiring and the connections to get to the classrooms are part of the program and that is exactly what the FCC did.

Now people have also made claims about this tax question. They said that the FCC has without authority imposed a tax on subscribers for telephone service and they have imposed a tax on the companies. Let me briefly read section 254(d) and then I will conclude my remarks. Every telecommunications carrier that provides interstate telecommunication services shall contribute on an equitable and non-discriminatory basis to the specific predictable and sufficient mechanisms established by the commission to preserve an advanced universal service.

So Congress directed the FCC to adopt rules and then directed the FCC to require the telecommunications carriers to pay into the universal service fund. The FCC did not invent this tax. It did not impose this tax unilaterally. And the amount of time, I will conclude my remarks. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Ames follows:]

PREPARED STATEMENT OF MATTHEW C. AMES, ESQUIRE, MILLER & EATON, P.L.L.C., WASHINGTON, DC, REPRESENTING EDLINC, THE EDUCATION AND LIBRARY NETWORKS COALITION

My name is Matthew C. Ames. Thank you for this opportunity to appear before the Subcommittee. I am a partner in the law firm of Miller & Van Eaton, P.L.L.C., here in Washington, and I am here on behalf of EDLINC, the Education and Library Networks Coalition, an alliance of more than thirty national education and library organizations. I will address the legality and constitutionality of the "E-rate" adopted by the Federal Communications Commission (the "FCC") as part of its implementation of Section 254 of the Telecommunications Act of 1996.

I advised EDLINC during the rulemaking process at the FCC, during which it revised traditional universal service rules and established the E-rate, as directed by Congress. I am also counsel to EDLINC in the appeal of the FCC's universal service order,[1] which is now pending before the United States Court of Appeals for the Fifth Circuit. EDLINC intervened in that case to support the FCC; I wrote EDLINC's brief and participated in the oral argument.

When Congress and the administration enacted the Telecommunications Act of 1996, it had four key objectives: 1) encourage competition in the telecommunications and broadcasting industry, 2) reduce regulatory burdens, 3) provide consumers with greater choice and lower rates and 4) expand and maintain an existing system of universal service that provides high-cost areas, low income families, rural health care providers, and schools and libraries with affordable access to advanced telecommunications. Universal Service for school and libraries, the E-Rate, is a clear example of a federal agency taking a congressional mandate and implementing it fully and appropriately under the law.

[1] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) (the "*Order*").

What is the "E-Rate" and Why Does it Matter?

The E-rate allows schools and libraries to purchase telecommunications services, internal connections, and Internet access at discounted rates. To participate, schools and libraries must meet a number of qualifications, issue requests for proposals and negotiate contracts with providers under their standard contracting procedures. Participating schools and libraries then pay the contract rate, less a discount based on: 1) whether the school or library is in an urban or rural area, and 2) the proportion of students who participate in the Federal school lunch program. The service provider receives the amount of the discount from the Federal universal service fund.

The central aim of the E-rate program's bipartisan sponsors was to narrow the technological access gap that exists between this nation's poor, rural, urban and minority students and their wealthier peers. A July 1999 report from the US Department of Commerce's National Telecommunications and Information Administration, entitled *Falling Through The Net: Defining the Digital Divide* ("NTIA Report"), demonstrates two critical points: 1) the gap in access continues to exist; and 2) schools, libraries and other community institutions represent the best and frequently the only opportunities for children from low-income families to utilize advanced technologies. The NTIA Report finds that whereas nearly 47% of White households have computers and 36% have access to the Internet, Black and Hispanic households still lag far behind in computer and Internet penetration. Only 23% of Black households and 11% of Hispanic households have computers, with Internet access for those groups totaling, respectively, 25.5% and 12.6%. NTIA Report at 6. In measuring access by income, the report finds that "Low income households in rural areas are the least connected, experiencing connectivity rates in the single digits for both PCs and Internet access." *Id.*

The figures quoted demonstrate that many students—especially minority students and/or those living in rural and low-income areas—must rely on local schools and public libraries to use computers and access the Internet. Moreover, according to the NTIA Report, K–12 schools and public libraries serve as critical Internet access points for Americans of all ages. Nationwide, nearly 21% of Americans access the Internet through K–12 schools and 8% use their local libraries for that purpose. Schools and libraries are especially important for rural residents, 30% of whom gain access to the Internet through their K–12 schools and 7.3% through their libraries.

The E-rate program is now in its second year. In the first year funding cycle, the fund distributed $ 1.67 billion in discounts in response to over 30,000 applications. Because the program was not funded to its cap in the first year, many applicants did not receive support from the fund, but 25,785 requests were at least partially funded. Of that funding, the vast majority went to the nation's poorest communities—79% to schools and libraries with discount levels over 70% and above.

Large urban school districts and extremely remote and rural schools have been among the funds biggest beneficiaries. For example, the Chicago Public School District which serves over 430,000 students received $ 47.5 million in funding, enabling it to bring Internet access into at least one classroom in every one of the district's schools. Similarly, in New York City, the $71 million the district received will enable it to meet their technology goals five years ahead of schedule, connecting 5 to 10 classrooms in each school by this fall . In small remote communities like Aniak, Alaska where there is no road access to any of the villages that make up the school district, the $41,000 the district received will make it possible to rewire the schools, install Internet connections and set up satellite dishes that will bring the resources of the rest of the world to the district's 425 students. Finally, in rural Michigan, the Woodland Library Cooperative's E-rate discount of $ 44,000 will ensure that farmers, senior citizens and others who could not otherwise afford the high cost of rural Internet access, will be able to connect at their local libraries to crop reports and other vital information services. This year the fund has already distributed 25% of the discounts and the rest are expected to be awarded within the next month.

The Attacks on the FCC's Universal Service Order.

Despite these positive results, the E-rate program has come under attack as an example of the FCC exceeding its jurisdiction. Opponents of the E-rate have claimed that the FCC went far beyond the mandate of Congress in Section 254(h) of the Telecommunications Act of 1996. Some claim that the FCC's universal service funding mechanism is an "unconstitutional tax." Neither claim is true, and both will be resolved shortly by the Fifth Circuit Court of Appeals. I urge the FCC's critics to allow the legal process to work—the court will resolve the issue soon enough, probably within the next few months.

I am confident that the court will uphold the FCC's rules as lawful and constitutional. After reviewing the legislative history and the FCC's rulemaking, I will ex-

plain why the FCC acted within its authority; then I will address the constitutional question.

The Legislative History of 47 U.S.C. § 254.

The 1996 Act was intended to increase the availability of modern telecommunications technology to all users. In order to accomplish this goal, Congress adopted two complementary mechanisms—competition and universal service. This country has historically recognized that market forces cannot and will not ensure that all Americans have access to telecommunication services at affordable rates. Consequently, long before Congress adopted the 1996 Act, the federal government and the states had adopted universal service programs to ensure affordable phone service for residents of rural areas and other parts of the country with high costs for constructing and maintaining telecommunications networks. Similar programs were established for the poor.

Like their predecessors, the authors of the 1996 Act recognized that merely promoting competition would not always achieve their goals. Indeed, driving prices toward costs would make it more difficult to deliver services to all users at affordable prices. Consequently, important provisions of the 1996 Act were directed to preserving and enhancing universal service, including universal service for schools and libraries. The FCC therefore was directed to both advance universal service and promote competition. Properly read, these obligations reinforce one another: competition is a means of extending service, universal service offers a means of promoting competition, and both advance the goals of higher quality, lower prices, and new services.[2]

In enacting Section 254, Congress established a comprehensive federal-state scheme to improve current universal service mechanisms and expand them by including schools and libraries, and rural health care providers, for the first time. But Congress did not employ a single mechanism to achieve this goal. The Senate bill that ultimately became the 1996 Act, S. 652, 104th Cong., 1st Sess. (1995) contained two separate provisions to assure comprehensive universal service. Section 253 ("Universal Service") established universal service principles and directed the FCC to establish a mechanism for telecommunications providers to contribute to universal service, and Section 264 ("Telecommunications Services for Certain Providers") required telecommunications carriers to provide universal service to schools and libraries and to rural health care providers at affordable rates.[3]

During consideration of S. 652, Section 264 was grafted onto Section 253 as new subsection 254(h), and services for schools and libraries, and rural health care, became part of universal service. But Section 264 was not completely integrated into Section 253 to create a single, uniform approach to universal service; instead, it was left largely intact, with appropriate cross-references between relevant subsections of new Section 254 inserted. Consequently, Congress established three separate universal service mechanisms, one for schools and libraries,[4] one for rural health care providers,[5] and a third for other classes of subscribers.[6] Although they are interrelated, they serve different purposes and operate in different ways.

This was a logical result, because schools and libraries, rural health care providers, and individual telephone subscribers all have different needs. In a statement on the Senate floor just before the adoption of the 1996 Act, Senator Snowe, chief sponsor of what became Section 254(h), noted that the purpose of universal service was to ensure that residents of rural areas should not pay more for essential telecommunications services than residents of urban areas. 142 Cong. Rec. S708 (daily ed. Feb. 1, 1996) (statement of Sen. Snowe). But, she added, "there is a widening gap between the high expectations of an increasingly technologically driven society and the inability of most schools—particularly rural schools—to prepare students adequately for the high-technology future." *Id.* Therefore, all schools and libraries must have affordable access to the Internet and other advanced services. *Id.* Senator Snowe also noted the particular benefits of "telemedicine" technology for rural health care. *Id.* at S708–709.

The Conference Report on S. 652 identified the particular services that Congress intended to be included in universal service for schools and libraries:

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[2] For a general discussion of how universal service can promote competition, see Reply Comments of the National School Boards Association, *et al.*, *Federal-State Joint Board on Universal Service*, CC Docket 96–45 at 11–17, filed May 7, 1996.

[3] The House counterpart of S.652, H.R. 1555, 104th Cong., 1st Sess. (1995) contained no provision equivalent to Section 264 of the Senate bill, although it did list access for educational users as a universal service principle in Section 247, "Universal Service."

[4] *See* 47 U.S.C. §§ 254(c)(3) and (h)(1)(B).

[5] *See* 47 U.S.C. §§ 254(c)(3) and (h)(1)(A).

[6] *See* § 254(c)(1).

> The ability of K–12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans—rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via schools and libraries. This universal access will ensure that no one is barred from benefiting from the power of the Information Age. . . .
>
> New subsection (h)(2) requires the FCC to establish rules to enhance the availability of advanced telecommunications and information services to public institutional telecommunications users. For example, the FCC could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to education materials, research information, statistics, information on Government services, reports developed by Federal, State and local governments, and information services which can be carried over the Internet.

H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. ("Conf. Rep.") at 132–133 (1996).

Thus, Congress expected the FCC to establish a means of delivering advanced telecommunications, including access to the Internet, to libraries and individual school classrooms.

The FCC's Universal Service Order.

The FCC carefully crafted its Order to apply the same considerations that motivated Congress. It relied on competition as a means of achieving the goals of the 1996 Act, and also sought to meet the particular needs of schools and libraries, within Congress's three-part structure.

In deference to competition, the FCC adopted the principle that universal service rules should be "competitively neutral." By this, the FCC meant that its rules should not create advantages or disadvantages for particular providers or technologies. *Order* at ¶47. The FCC's goal, consistent with that of Congress, was to promote new technologies that might provide competitive alternatives in rural, insular and high cost areas. *Order* at ¶50. In other words, it saw universal service as a means of promoting competition. The FCC also noted that it already had an obligation to adopt competitively neutral rules for service to schools and libraries. *Order* at 587.

The FCC also developed a detailed factual record confirming Congress's judgment regarding the special needs of schools and libraries. For example, the Order noted that when the rulemaking proceeding began, only nine percent of all instructional rooms were connected to the Internet. *Order* at ¶467. The record also showed that many of the computers installed in schools were not connected to any internal or external network.[7] Although as of 1995 49% of schools had local area networks, half were used only for administrative purposes, and less than 10% were used to connect computers in all classrooms.[8] A General Accounting Office report found that over half of all schools surveyed reported deficiencies in the number of modems, telephone lines, and internal conduits for installing connections.[9] Libraries faced similar problems: for example, a 1995 survey showed that in libraries serving communities of 100,000 or more, 68.3% had Internet access, but only 23.3% provided public access terminals.[10] Some schools and libraries were making great efforts to take advantage of the new technology, but most institutions lagged far behind.[11]

The record also confirmed Congressional concerns about the consequences of not meeting these needs. For example, the record showed that in 1984, 25% of jobs required computer or networking capability, but in 1993, that figure had grown to 47%.[12] By the year 2000, 60% of jobs are expected to require computer and advanced telecommunications skills, and such jobs will pay 10–15% more than oth-

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[7] Joint Comments of the National School Boards Association, et al., Federal-State Joint Board on Universal Service, CC Docket No. 96–45, filed April 10, 1996 ("NSBA Comments"), at p. 6 (citing McKinsey & Co., Connecting K–12 Schools to the Information Superhighway (1995) ("McKinsey")).

[8] *Id.*

[9] General Accounting Office, *School Facilities—America's Schools not Designed or Equipped for 21st Century*, B–259609 (Apr. 4, 1995), cited in NSBA Comments at 6.

[10] ALA Comments, *Federal-State Joint Board on Universal Service*, CC Docket No. 96–45, filed April 10, 1996, at 7.

[11] NSBA Comments at 3–4; EDLINC Comments, *Federal-State Joint Board on Universal Service*, CC Docket 96–45, filed August 2, 1996, at 2–7.

[12] NSBA Comments, at p. 4 (*citing* McKinsey).

ers.[13] But today businesses must spend large sums training and retraining workers because the schools do not have access to the necessary technology.[14]

With these facts in mind, the FCC sought to address the needs of schools and libraries in the most pro-competitive manner permitted by the statute.[15]

The plain language of Section 254 and the legislative history of the 1996 Act leave no doubt that Congress expected the FCC to take the steps needed to foster delivery of advanced telecommunications technology—including access to the Internet—directly to the classroom. Section 254 ensures that classes of users with particular needs, schools and libraries among them, are not left behind because of their location or ability to pay.

The specific emphasis on advanced services for schools and libraries is critical. There would be little educational benefit in establishing discounted rates for traditional telephone service to the principal's office. Congress understood what kinds of technologies schools and libraries need to be effective, and it directed the FCC to deliver what is needed, where it is needed.

The FCC Had the Authority to Adopt the E-Rate Under General Administrative Law Principles.

EDLINC believes that, given the statutory language of the universal service provisions in 47 U.S.C. § 254 and the pro-competitive mandate of the 1996 Act, the FCC did exactly what Congress directed it to do. Furthermore, under long-standing Supreme Court precedent, if Congress enacts a statute and fails to address an issue, or addresses it in an ambiguous fashion, the administrative agency responsible for implementing the statute has broad discretion to do what is necessary to accomplish the goals of Congress.[16]

The Supreme Court has established a two-part test for determining whether an agency has acted within its authority. In the *Chevron* case, cited above, the Supreme Court held that in reviewing an agency's decision a court must first examine whether the enabling statute is silent or ambiguous on an issue. If the court determines that Congress has not addressed a matter, or has not spoken clearly, the agency has broad discretion to address the issue.

The first question, therefore, is always "What does the statute say?" If the agency's rule clearly falls within the plain meaning of the law, the rule will be upheld. If the rule clearly falls outside the plain meaning, the agency will be overruled. If the rule is reasonable in light of the overall purpose of the legislation and addresses an issue Congress did not, the rule will again be upheld.

Thus, even if Congress had not spoken clearly, the FCC would have been acting within its lawful authority. In fact, however, as discussed below, Congress spoke quite clearly.

The Structure and Language of Section 254 Demonstrate that Congress Meant Universal Service for Schools and Libraries to Encompass Telecommunications Services, Internal Connections and Internet Access.

Because the services schools and libraries need to perform their missions are different from those required to meet general universal service goals or the needs of rural health care providers, Congress established three different types of universal service, each comprising different types of services.

First, in Section 254(c)(1), the statute defines universal service in terms of telecommunications services only. That section directs the FCC to periodically establish a level of service, based on advances in telecommunications and information technologies and services, directed at the needs of residential subscribers. But this level of service is not limited to residential subscribers, because Section 254(c)(3) authorizes the FCC to extend services under subsection (c)(1) to schools, libraries, and rural health care providers.

Second, Section 254(c)(3) also authorized the FCC to expand the definition of universal service for schools and libraries and rural health care providers beyond that in Section 254(c)(1); here, Congress did not limit the services under discussion to "telecommunications services," but referred to "special services" needed to meet "the purposes of subsection (h)."

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[13] *Id.* at 5.

[14] *Id.* at 4, *citing* The Children's Partnership, America's Children and the Information Superhighway (Sep. 1994).

[15] I would note here that the FCC does not impose any tax or fee on telephone subscribers. Telecommunications carriers are required to pay into the universal service fund because Congress so required, in 47 U.S.C. § 254(d). Carriers are permitted—but not required—to recover those amounts from subscribers, but the FCC imposed no payment other than the Congressionally-mandated payments from carriers.

[16] *Chevron USA, Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

Subsection (h) establishes the basic mechanism for providing special universal services to each of the two additional classes. In defining the services to be made available to rural health providers in Section 254(h)(1)(A), Congress again referred specifically to "telecommunications services." But Section 254(h)(1)(B) is different. Instead of using language parallel to that applicable to rural health care providers, Congress used the general term "services," clearly indicating that it meant something more than just "telecommunications services."

Therefore, under the statute, basic universal service consists of telecommunications services; universal service for rural health care providers consists of basic universal service plus additional telecommunications services needed to meet the particular needs of rural health care providers;[17] and universal service for schools and libraries consists of basic universal service, plus additional telecommunications, information, and other services needed to meet the particular needs of schools and libraries. Under this three-part structure, the FCC reasonably determined that schools and libraries should be eligible for discounted rates for all commercially-available telecommunications services, Internet access, and internal connections. *Order* at ¶425; 47 C.F.R. §§ 54.502, 503.

There is little debate about the inclusion of telecommunications services: even the FCC's critics generally concede that they are included. But a careful reading of the statute demonstrates that Congress must have meant for the FCC to include both Internet access and internal connections, as well.

For example, Congress also explicitly required the FCC to make Internet access eligible for discounts. Section 254(h)(2)(A) directs the FCC to establish rules that will "enhance access to advanced telecommunications and information services. . . ." Whether Internet access is an information service, a telecommunications service, or some sort of hybrid, is irrelevant. The FCC was expressly directed to enhance access to both types of service, and if Internet access does not constitute "access to advanced telecommunications and information services," what does?

The legislative history confirms that Congress meant for all schools and libraries to have access to the Internet. The Conference Report expressly stated that:

> The provisions of subsection (h) will help open new words of knowledge, learning and education to all Americans—rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via schools and libraries. This universal access will ensure that no one is barred from the benefiting from the power of the Information Age.

Conf. Rep. at 132–133.

The Report goes on to say:

> New subsection (h)(2) requires the FCC to establish rules to enhance the availability of advanced telecommunications and information services to public institutional telecommunications users. For example, the FCC could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to education materials, research information, statistics, information on Government services, reports developed by Federal, State and local governments, and information services which can be carried over the Internet.

Id. at 133.[18]

This is clear enough. Given the importance of the Internet as a means of communications and as a research tool, the express reference to it in the Conference Report, and the fact that it is clearly "an advanced telecommunications and information service," not including access to the Internet among the services eligible for discounts would have defeated the purpose of Section 254(h).[19]

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[17] Indeed, because of this limitation, the FCC did not include full Internet access in the services to be provided to rural health care providers. Instead, the FCC chose to enhance access to the Internet by making only limited toll-free access to the Internet eligible for support. *See* Order at ¶630.

[18] *See also* 142 Cong. Rec. S708 (daily ed. Feb. 1,1996) (statement of Sen. Snowe) ("The Internet, the 'information highway,' is increasingly critical to our children and our nation. How can we hope to compete in the world economy if our educational institutions are unable to link with a critical telecommunications link?") 141 Cong Rec. S7982 (daily ed. June 8, 1995) (statement of Sen. Robb) ("Without more affordable rates, schools, by the thousands, will not have adequate, and, in some cases, not have any access to the Internet.").

[19] A secondary issue is what Congress meant by "enhance access." To "enhance" means to "to increase or make greater . . . ; augment." AMERICAN HERITAGE DICTIONARY 434 (1970). Thus,

Finally, making Internet access eligible for discounts promotes competition by increasing the market for such services. If schools and libraries have the financial means to purchase Internet access, their entry into the marketplace creates an opportunity for new service providers to compete against established providers. If the new providers succeed and expand their markets to other classes of subscribers, prices will come down, perhaps even to the point that discounts are not required. Presumably, the resulting competition will also engender new services and higher quality. Thus, the FCC's rules advance both competition and universal service, and in the process promote the overall goals of Congress.

Congress also meant for the FCC to include internal connections in the E-rate. Section 254(h)(2) expressly directs the FCC to do so because it requires the FCC to enhance access to "classrooms."[20] This choice of words is obviously significant. Congress could have referred simply to schools and libraries, as it did in numerous other places in Section 254, but it did not. Any defensible construction of the statutory provisions must take this choice of words into account.

Having concluded that Congress meant for the advanced services under Section 254(h)(2)(A) to be delivered directly to the classroom, the FCC had to decide how to comply with the congressional mandate. Presumably one could "enhance access" to telecommunications services and information services at the classroom level by various means. For example, the FCC could have provided funds for schools to hire runners to relay information from a single computer lab or telecommunications control center to every classroom in a building. Of course, this would have been ludicrous, because the entire purpose of the 1996 Act and Section 254(h) was to promote the growth of modern technology.

So the question becomes, how did Congress intend for the FCC to enhance access to telecommunications services and information services in classrooms? The FCC naturally concluded that it had no realistic alternative but to take steps to ensure that those services could be delivered directly to classrooms using technology at least as advanced as the services themselves.[21] Without internal connections, individual schools might be able to obtain enhanced access to certain services, but individual classrooms could not.

Some have claimed that internal connections are not a service. This is incorrect, however, because the installation and maintenance of facilities is plainly a service. *See NARUC* v. *FCC*, 880 F.2d 422, 430–431 (D.C. Cir. 1989) (referring to "inside wiring services" and "installation and maintenance services"). What schools and libraries need and what the rules provide are functional networks, which require a combination of engineering design, construction, and maintenance services.

Furthermore, as the FCC noted, to find that internal connections are goods and not services would create an artificial distinction between purchasing the installation of internal connections, and leasing the use of internal connections owned by a provider. *Order* at ¶452. This distinction would skew the marketplace in favor of entities that make their facilities available to others, and against entities that use their own facilities. This is precisely the kind of distinction the 1996 Act meant to erase. *See* 47 U.S.C. §251. It would also violate the pro-competitive policy of the 1996 Act. Consequently, the FCC properly included internal connections among the services eligible for discounts.

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to enhance is to improve something already available. Internet access is technically available everywhere there is a telephone line, although it may be prohibitively expensive or impractical to use because of technical limitations. Therefore, the FCC may "increase" or "augment" access to the Internet by taking steps to reduce its costs and making it easier to use. Making Internet access eligible for discounts enhances access by reducing the cost of the service.

[20] Section 254(h)(2) states:

> The FCC shall establish competitively neutral rules—
> (A) to enhance . . . access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries. . . ." (empbasis added).

[21] In any event, there was little doubt that Congress meant to include internal connections. On several occasions lawmakers commented on the need to deliver new services directly to classrooms. *See, e.g.*, 142 Cong. Rec. S708 (daily ed. Feb. 1, 1996) (statement of Sen. Snowe) ("Almost 90 percent of kindergarten through 12th grade classrooms lack even basic access to telephone service."); 141 Cong. Rec. S7981 (daily ed. June 8, 1995) (statement of Sen. Rockefeller) ("A 1995 study by the National Center for Education Statistics discovered, to my shock, that only 3 percent of classrooms in public schools in America were connected to [the] Internet."). In addition, the Conference Report states tbat in interpreting Section 254(h)(2), "the FCC could determine that the telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to [various types of materials]." Conf. Rep. at 133. Finally, there was also clear evidence in the record before the FCC of the lack of connections within schools capable of delivering services directly to classrooms. NSBA Comments at p. 6 (*citing* McKinsey).

Finally, making internal connections eligible for discounts promotes competition because it makes a whole range of services available in individual classrooms, thus broadening the market for those services and increasing the number of potential competitors. Just as with Internet access, the FCC's decision increases the likelihood that quality will improve, prices will drop, and new services will become available.

For all these reasons, the FCC clearly acted within its authority in establishing the E-rate mechanism.

The E-Rate Is Not an Unconstitutional Tax.

Some critics of the FCC claim that the E-rate mechanism somehow exceeds the agency's authority because it imposes an unconstitutional tax. This argument is based on a misreading of the Constitution and flawed reasoning. The Constitutional provision in question is Section 7 of Article I, known as the "Origination Clause." The Origination Clause states that "All Bills for raising Revenue shall originate in the House of Representatives . . ." The FCC's critics claim that funds paid into the universal service fund by telecommunications carriers are taxes, and that the Origination Clause has been violated because the 1996 Act originated in the Senate, and not the House of Representatives.[22]

The first point to note here is that this argument does not apply only to the E-rate, or funds used to support the E-rate. If the Origination Clause was violated, then contributions used to support all forms of universal service—including support for rates in rural and other high cost areas, as well as the E-rate—are invalid.

Second, the Origination Clause says nothing about taxes—it refers only to "Bills for raising Revenue . . ." It is true enough that a tax bill must originate in the House of Representatives. But the Telecommunications Act of 1996 was not a tax bill. It was an exercise of Congressional power to regulate interstate commerce, and happens to include various revenue-related measures necessary to the overall purposes of the legislation. The Supreme Court has made this distinction between "Bills for raising Revenue" and statutes that incidentally raise revenue to support a particular program in numerous cases. *See, e.g. United States* v. *Munoz-Flores*, 495 U.S. 385 (1990); *Millard* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897).

In fact, the Court of Appeals for the District of Columbia Circuit has already ruled that assessments used to support universal service programs established before the 1996 Act was adopted were not unconstitutional taxes for this very reason. In *ALC Communications Corp.* v. *FCC*, the D.C. Circuit dismissed an origination clause claim, stating that "the assessments at issue are merely transfers from IXC [inter-exchange carriers] to high-cost LECs [local exchange carriers] and low-income telephone subscribers. They need not be authorized in a revenue bill originating in the House since 'there was no purpose . . . to raise revenue to be applied in meeting the expenses and obligations of the Government.'"[23] The court went on to say that "universal service assessments fit comfortably within the range of special-purpose levies that are consistent with congressional authority to regulate commerce . . . and Congress has given the FCC a regulatory mandate sufficiently broad to authorize the assessments."[24]

Consequently, the constitutionality of the universal service fund and the E-rate is not an issue.

Conclusion

As a final note, I believe this issue needs to be put into a practical context. Much rhetoric has been expended to attack the E-rate, on various grounds; in reality however, the program has broad-based support. 87% of Americans support providing discounts to needy schools and libraries; 83% of Americans think that Internet access in schools and libraries will improve educational opportunities for all Americans; 87% of Americans support continuing discounts for libraries and schools.

Furthermore, even early critics of the E-rate have changed their tune. Many of the incumbent telephone companies expressed opposition in the early days after the Order was released; three—GTE, Southwestern Bell, and BellSouth—challenged the E-rate in their joint brief before the Fifth Circuit. Southwestern Bell, however, later

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[22] The critics are forced to make the Constitutional argument because Congress plainly told the FCC to require all telecommunications carriers to pay into the universal service fund. 47 U.S.C. § 254(d) says that every telecommunications carrier that provides interstate services shall contribute—the FCC may only grant waivers in limited circumstances. Having failed to convince the FCC to grant a waiver, some parties resorted to the unconstitutional tax claim.

[23] *ALC Communications Corp.* v. *FCC*, 925 F.2d 487 (D.C. Cir. 1991), 1991 WL 17222 (unpublished), quoting *Millard* v. *Roberts*, 202 U.S. 429, 436–37 (1906).

[24] *See id.*

withdrew its opposition to the E-rate, and BellSouth has withdrawn from the case entirely. Furthermore, at oral argument, Counsel for GTE stated in response to a question from the bench that the e-rate program "was not a big issue" for the company. In addition, the E-rate enjoys strong support from affected industries: the Information Technology Association of America, the Information Technology Industry Council, and the National Cable Television Association all filed briefs supporting the FCC on this point.

In short, the E-rate is beneficial, lawful and popular. I would be the last person to say that the FCC is immune from criticism—but in this instance, the FCC is correct and the critics are wrong.

Thank you again for this opportunity to appear before you. I would be happy to answer any questions.

Mr. GEKAS. We thank the gentleman. We turn to Mr. Miller.

STATEMENT OF JAMES C. MILLER, III, COUNSELOR, CITIZENS FOR A SOUND ECONOMY, WASHINGTON, DC

Mr. MILLER. Mr. Chairman, I would like to make five points. First, Article 1, section 7 of the Constitution requires all revenue measures to originate not only in Congress but in the people's house, not in Federal agencies. Second, arguably, the present standards constitute an undue delegation of authority to agencies for revenue-raising purposes. Thirdly, the language of the bill as written conceivably has a so-called *Chadha* problem, that is to say if you characterize the bill as essentially holding in abeyance an agency's authority to promulgate a revenue-raising measure subject to congressional approval you may have a constitutional problem. But if instead, you give it authority to propose such measures to Congress for passage of both Houses and presentment to the Congress there is not a charter problem.

Not again, if your language is perceived to be a check of Congress on the authority they have under statute there could be a *Chadha* problem.

Fourthly, I think this approach could be expanded and should be expanded, that is to say when Federal regulatory agencies promulgate major regulations, say $100 billion a year—excuse me, $100 million a year—or more in cost to the economy, they should go through the same process. That is to say the effectiveness of their regulation should be held in abeyance unless and until Congress acts to validate them by passage of a joint resolution with presentment to the President.

The final point I would make is that it is a bit of a two-edged sword because if you validate such a proposal from an agency, that initiative isn't subject to court tests in the same way and for many of the reasons that major regulations are commonly tested in the courts today—because Congress will have passed it, it would become a law rather than a regulation that is tested on the standards of the Administrative Procedures Act. Mr. Chairman, it seems to me that passage of this Taxpayer's Defense Act ought to be a no-brainer.

I don't see any down side and I see up sides. All that you are doing here is just reaffirming, it seems to me, what our Founders considered to be the appropriate way for the Federal Government to raise revenue.

I will leave it to others to talk about how this has worked in practice but I will tell you this: as a former chairman of the Federal Trade Commission which I headed for 4 years, a so-called

independent agency like the FCC—sometimes I got up in the morning and looked at myself in the mirror and I thought, you know, I work for 535 Members of Congress plus the President of the United States. Other days I got up and I looked at myself in the mirror and I said, you know, I don't work for anybody. As long as I keep within bounds, I can do most anything I want. That is not good, accountable government. That is not what the citizens of the United States expect when it comes to the exercising of the taxing powers of the Federal Government. You are right, and we ought to see passage of this act, Mr. Chairman. Thank you very much.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JAMES C. MILLER, III, COUNSELOR, CITIZENS FOR A SOUND ECONOMY, WASHINGTON, DC

The "Taxpayers Defense Act" presents three constitutional issues. The first is basic. Article I, Section 7 begins: "All Bills for raising Revenue shall originate in the House of Representatives . . ." The intent of the Founders was clear: all measures to raise money to defray the costs of the federal government must originate with the Congress, specifically, the "people's body." The revenue measures that give rise to The "Taxpayers Defense Act" do not originate with the people's body, nor even with Congress. They emerge from another branch of government altogether—the executive branch or even an "independent," fourth branch.

Second, under a long line of court cases, there is a strong argument that some, if not all, of the revenue measures that give rise to the "Taxpayers Defense Act" constitute an unconstitutional delegation of authority to a regulatory agency. That is, quite aside from Article I, Section 7, the taxes imposed by regulatory agencies may be unconstitutional because the delegation of such authority may be deemed "excessive" or "undue."

The third constitutional issue relates to the wording of the "Taxpayers Defense Act" itself. In short, there may be a "Chadha problem."[1] If the bill's language is constructed so that, notwithstanding any other provision of law, regulatory agencies have no power to levy "taxes," but do have the power to recommend revenue-raising *legislation* to Congress, with initial action by the House of Representatives and final presentment to the President, then there is no question. But if the language is construed to mean that the agencies continue to have "taxing" authority, but that their actions are subject to a "check" by Congress and the President, then the effort runs a risk of being overturned by the Courts.

The technique employed in the "Taxpayers Defense Act" could be expanded to include major non-financial regulations in addition to those that raise money. By reasonable estimates, the financial burden federal regulatory action imposes on the private sector is a substantial (approximately one-third) fraction of the financial burden the federal government imposes through ordinary taxes. Moreover, such an effort, perhaps limited initially to "major" regulations (for instance, those having a financial impact of $100 million or more) could be an important initial step in putting together and employing a "regulatory budget," which would greatly improve the cost-effectiveness and accountability of government.

However, it must be pointed out that such "tax" and regulatory measures that go through the legislative proposal route, as opposed to being issued under the Administrative Procedures Act, would not be reviewable by the courts (except, of course, with respect to constitutionality). That is, no matter how sloppy or unfair the procedures the agency employed to come up with their "tax" or regulatory proposal, or how unsubstantial the evidence the agency relied on to support its arguments, favorable action by Congress and the President would moot any challenge of the type frequently employed in the courts.

Making it clear that agencies have no authority to apply taxes (as opposed to specific user fees) would increase the accountability of government. The "Taxpayers Defense Act" is deserving of support.

Mr. GEKAS. Thank you. Mr. Schatz, how do you respond to Mr. Ames' in his recitation of the authority for the so-called Gore tax?

Mr. SCHATZ. There is certainly a court challenge at the moment. We are not involved with it but it will be of some interest to see

[1] *Immigration and Naturalization Service* v. *Chadha*, 462 US 919 (1983).

how it does come out. I think certainly as Mr. Miller has pointed out, we have questions about how Congress has delegated some of this responsibility and whether or not that is itself constitutional. I think that is somewhat of the fundamental underlying question. The other issue relates to the need for such a large amount of money when some 80% of schools already have access to the Internet. Bill Gates gave $13 million to the State of Louisiana to wire all of the libraries and we see a lack of oversight from the Congress in terms of how the money is really being used.

There have been a lot of questions raised about whether everybody who is getting the money really needs it, whether the organizations that were set up by the FCC itself, these non-profit organizations, are themselves of any constitutional validity. Your bill would, I think, address these things as they came up a lot more effectively than what we have now which is a lack of oversight and a much less clear definition of fee versus a tax.

Mr. GEKAS. Mr. Ames, do you acknowledge that Members of Congress and Congress as a whole over the years have been very supportive of libraries and of schools countless ways and with countless billions of dollars over the years. Is there any notion by any of the people who support your position that those of us who look quizzically at what happened with the universal service tax are against libraries or against——

Mr. AMES. No.

Mr. GEKAS. But rather that some of us feel that if we want to extend additional aid to the libraries of our country we should do it as legislators should through deliberation, debate and final passage of and signature by the President of legislation that provides for the funding for such ventures.

It seems like Mr. Miller says like a no-brainer which is the preferable way to do it.

Mr. AMES. Mr. Chairman, if I could just make a couple of points. One is, no one is saying that any particular individual or the Congress in general is not supporting schools and libraries because of any particular position that they have with respect to how the FCC implemented the statute. But I would like to go back to the language of the statute. I think it is very clear that Congress did direct the FCC to set up a mechanism to provide these discounted rates and told the FCC to have the carriers pay for it.

With respect to Congressional oversight, I respectfully disagree with Mr. Schatz. I mean Congress was very much involved in oversight of the FCC on this point over the last couple of years. The original funding amount set up was $2.25 billion and in response to concerns expressed by Congress that amount was reduced specifically as part of the oversight process. There were concerns about how—he again referred to this organizational structure that was set up and again that was addressed in appropriations legislation and one of the administrative corporations that had been set up was merged into another.

There have been statements made about funds being used for inappropriate purposes and the GAO has looked into that. They have given the FCC and the Universal Service Corporation a clean bill of health. They had Price Waterhouse come in and examine that.

So I mean there is a lot of, I think, misunderstanding about what is actually going on.

Mr. GEKAS. Clear me up because I have a misunderstanding. The telephone subscriber who has this extra charge, is that charge for additional services rendered through that subscriber?

Mr. AMES. Not directly. The charge—what is going on——

Mr. GEKAS. Well, to follow up on my great cross examination here. So if that extra charge for the telephone subscriber does not benefit or is not a fee for services to be rendered, if it is not a fee, what is it if it is not a tax?

Mr. AMES. Well, let me—there are two issues. I think there are two issues there. One is the distinction between a tax and then there is the question of what is it that is prohibited by the Constitution, what is it that has to originate in the House of Representatives. First of all, with respect to the universal service contribution, I said it is not directly. There may not be a direct benefit but the fact is that by making it easier for people in rural areas, areas where it is expensive to provide service, that fund expands the network and that provides a benefit to me. As a resident of Fairfax County, Virginia, I can reach people in South Dakota or Alaska who might otherwise not choose to pay for telephone service, and that is the concept of the universal service fund so there is actually a benefit there.

Now even if it is a tax, let's just say for the sake of argument that it is a tax. There is not a constitutional issue here for two reasons. One is that what the origination clause forbids, it says that bills for raising revenue must originate in the House of Representatives. The 1996 Telecommunications Act was not a bill for raising revenue. The revenue portions, in this particular case, the universal service fund, are purely incidental to the much larger scheme, and the Supreme Court has held on a number of occasions, the Supreme Court has said that a bill for raising revenue is a bill that has the primary purpose of adopting a tax.

Now as far as universal service specifically goes, a few years back, I think it was in 1995 in the ALC Communications case, the D.C. Circuit Court of Appeals specifically said that the prior universal service scheme was unconstitutional even though there were—the exact same challenge was raised and people said that under the prior universal service scheme that that was an unconstitutional tax and the court said that that was not true.

Mr. GEKAS. Mr. Ames, I pointedly said at the outset in my opening remarks that I do not believe nor do I intend as one of the authors of the legislation to upset, to overthrow the now dreaded result of the universal tax, we call tax, for the libraries and schools, but rather to look at future events in the Congress and among the public that might require this type of scrutiny. Do you oppose this legislation knowing that it grandfathers your little baby into perpetuity?

Mr. AMES. Mr. Chairman, first of all, I did catch your comment at the outset and we do appreciate that. We have no position. At least I am not authorized to take any position with respect to your legislation and so I have to say no, we are not opposed to it.

Mr. GEKAS. All right. Thank you. Although this has been kind of a truncated hearing, we have learned a great deal. Now we have

a press conference scheduled for 1 p.m. on the Triangle in front of the Capitol or back of the Capitol to which Senator Thompson from the other chamber is scheduled to appear to add his comments. He intends to introduce similar legislation in the Senate. You are all invited. Everybody in this room is invited to come to that press conference to jeer or cheer, I don't care which.

We will continue the debate in front of the cameras on the Triangle on the campus. We thank you for your contributions. In a later session of this subcommittee scheduled for this afternoon, I will be asking for unanimous consent to include into this record all the statements that have been forwarded to us by the witnesses. Thank you very much for your help.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF PETER J. SEPP, VICE PRESIDENT FOR COMMUNICATIONS, NATIONAL TAXPAYERS UNION

INTRODUCTION

Mr. Chairman, on behalf of the 300,000 members of National Taxpayers Union (NTU), I appreciate the opportunity to submit remarks for the Record in support of the Taxpayer's Defense Act. introduced by you and your colleague, J.D. Hayworth.

In the best of all possible political worlds, the Taxpayer's Defense Act would not be necessary legislation. Yet, the modern reality of interest group pressures, bureaucratic power brokers, and an erratic judiciary has given taxpayers cause to fear the demise of one of their most cherished principles: no taxation without representation. For these reasons, and for reasons to follow, NTU believes that Congress should reaffirm this principle through passage of the Taxpayer's Defense Act.

THE CONSTITUTION SPEAKS LOUDLY AND CLEARLY

Literally millions of pages of legal opinions, scholarly commentaries, and historical accounts have been published in attempts to clarify the "true meaning" of the U.S. Constitution. While there are certainly legitimate interpretation questions surrounding many facets of that document, there is virtually no doubt of the Framers' intent to vest the power of taxation in the legislative branch.

Article 1, Section VII states that "All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." Article 1, Section VIII, Paragraph 1 states that "The Congress shall have the power . . . To Lay and Collect taxes, duties, imposts, and excises . . ."

These provisions leave little room for manipulation. The former clause uses the all-inclusive term of "revenue"—not "taxes," "fees," or "levies"—and makes no legislative exceptions. The latter is likewise an affirmative, unambiguous grant of power and responsibility.

REPRESENTATIVE GOVERNMENTS HISTORICALLY RESTRICT WHO CAN TAX

The Founders consciously ceded to Congress all powers of tax lawmaking, great and small, out of a longstanding Western notion that truly representative government demands such an arrangement. The Magna Carta of 1215, foisted upon King John by taxpaying classes of the time, stipulated that "no scutage or aid . . . shall be levied except by the common consent of the realm" rather than decree by the Crown.

Locke's *Second Treatise of Government* reiterates the point that to tax without consent of the people "by themselves or their representatives . . . subverts the end of government."

In 1751, Montesquieu's *Spirit of the Law* observed that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates . . ."

The so-called "Stamp Act Congress" of 1765 adopted a *Declaration of Rights and Grievances* that stipulated "[It] is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally, or by their representatives."

These "representatives" were not members of the executive branch or judges. According to the *Declaration*, "[N]o taxes ever have been, or can be constitutionally im-

posed on them but by their respective Legislatures." This distinction carried through to the Declaration of Independence and later to the U.S. Constitution.

UNELECTED BUREAUCRACIES ARE UNDEMOCRATIC

Taking the American people's earnings should be a difficult and contemplative exercise for government. The Executive Branch, which is charged with carrying out laws that were crafted and deliberated upon by Congress, is not intended to serve as a "shadow legislature." Before another dime is added to the record federal tax burden, at a minimum Americans should have the ability to address elected officials on the topic, and later hold them accountable.

This is not some quaint notion held only by those who learned American history from a grade-school textbook. Executive Branch officials with years of service have voiced similar concerns.

Former Office of Management and Budget Director Jim Miller wrote:

> The authority to tax has passed through so many hands that it is nearly impossible to seek redress within the political process. . . . Common sense dictates that when government officials command resources from taxpayers, those officials should be those we elected to govern. Often this is the reason cited to explain why in our system of government 'All Bills for raising Revenue shall originate in the House of Representatives.'

More specifically, Federal Communications Commissioner Harold Furchtgott-Roth has objected to the so-called "e-rate" precisely because of its constitutional illegitimacy. According to Paul Misener, Furchtgott-Roth's Senior Legal Advisor:

> We believe [the e-rate] is a tax because it is imposed on some parties for the benefit of other parties, which makes it a tax, not a fee. . . . Because it was generated by the Federal Communications Commission and not Congress, we believe it's an unlawful tax because our Constitution allows only Congress to impose taxes.

Allowing unelected officials to levy taxes on the American public violates any and all basic tenets of democratic representation, and many of those officials seem to recognize this fact. Congress must now do the same.

UNACCOUNTABLE TAXES MEAN BIGGER GOVERNMENT

The Information Age has arguably done more to restrain overt taxation on the federal level than any other recent trend. Citizens now have access to documents, news, and expert analysis that makes overt tax hikes difficult to conceal, much less enact without taxpayers' knowledge.

Advocates of big government have begun to learn from this development, and are now plying their trade in areas such as unfunded mandates and antitrust harassment. Taxation by the unelected is yet another tool of this unseemly trade:

- The FCC's Universal Service Tax, never affirmed by an act of Congress, now costs telephone customers over $2.5 billion per year.
- The National Science Foundation and the Commerce Department have both levied or proposed to levy taxes on Internet domain names, again without explicit Congressional consent.
- Buried in the Clinton Administration's "Comprehensive Electricity Competition Act" is a provision to enable the Federal Regulatory Energy Commission to levy a $3 billion tax.
- The Department of Transportation has proposed—without Congressional approval—to subject new categories of businesses to the hazardous materials registration fee, and dramatically increase that fee for others.

A recent poll by *Reader's Digest* confirmed that most Americans believe the maximum total tax burden that anyone should have to pay to all levels of government is 25 percent of income. The actual tax burden of a median-income, two-earner family is now approaching 40 percent.

All of these proposals, and many others, accomplish the undesirable goal of forcing Americans to pay more for government than they would normally agree to pay in an environment of visible, accountable taxation.

Yet, how long will it be before the Information Age overwhelms this veil of deceit? More to the point, whom will the American people blame when they discover this hidden taxation—the faceless bureaucrats who invented these schemes, or the Members of Congress who should have protected citizens from them?

TAXPAYERS DESERVE AN INSURANCE POLICY NOW

To reiterate, NTU believes that the question of Executive Branch taxation should be a moot one. The Constitution is explicit on the matter, and the Judicial Branch ought to strike down this abuse of power. In fact, our members eagerly anticipate a ruling against the constitutionality of the e-rate, which is currently being litigated in federal court.

Yet, experience is a sobering check on enthusiasm. After the National Science Foundation's Internet domain registration tax was struck down by a federal judge, the Commerce Department has since followed suit with a similar tax of its own. How many more finite resources will individuals and businesses pour into such challenges against the government's multibillion-dollar legal army, before they become exhausted?

Congress can and should take out a taxpayer's "insurance policy" against such a legal conundrum, by passing the Taxpayer's Defense Act. Such a law would make it more difficult for courts to carve out dangerous exceptions to Congress's authority over tax policy.

In addition, enactment of the Taxpayer's Defense Act could spur similar efforts to limit the encroachment of state and local executive agencies upon the tax-writing prerogatives of their legislative counterparts.

As a bonus, the Taxpayer's Defense Act could very well provide a "chilling effect" upon the taxing tendencies of the Judicial Branch. Although courts have inflicted some overt damage on federal tax policy by mandating or affirming unconstitutional taxes, they have wreaked much more havoc upon the public trust at the state and local level. A series of court rulings from Ohio to New Hampshire have thrown entire tax systems into disarray, and have threatened residents with steep new taxes on incomes and purchases in many jurisdictions. Congress's resolute stand against executive branch taxation could send an important message to these courts.

CONCLUSION—CONGRESS SHOULD LOOK BACK AND MOVE FORWARD

To update an old saying, the more things change, the more certain things should stay the same.

As our nation looks hopefully to a new century of prosperity and freedom, Congress must look back to the solid founding principles of our Republic. The Taxpayer's Defense Act provides an important piece of the map that will help to steer America towards this vision.

We look forward to working with Members of the House and Senate to enact this legislation.

Note: *E-Rate Connecting Kids and Communities to the Future* is on file with the House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law.

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(Original Signature of Member)

106TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. GEKAS introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 5, United States Code, to provide for Congressional review of rules establishing or increasing taxes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Taxpayer's Defense Act".

SEC. 2. MANDATORY CONGRESSIONAL REVIEW.

Chapter 8 of title 5, United States Code, is amended by inserting after section 808 the following:

"SUBCHAPTER II—MANDATORY REVIEW OF CERTAIN RULES

"§ 815. Rules Subject to Mandatory Congressional Review

"A rule that establishes or increases a tax, however denominated, shall not take effect before the date of the enactment of a bill described in section 816 and is not subject to review under subchapter I. This section does not apply to a rule promulgated under the Internal Revenue Code of 1986. For purposes of this section, the term 'tax' means a non-penal, mandatory payment of money or its equivalent to the extent such payment does not compensate the Federal Government or other payee for a specific benefit conferred directly on the payer.

"§ 816. Agency Submission

"Whenever an agency promulgates a rule subject to section 815, the agency shall submit to each House of Congress a report containing the text of only the part of the rule that causes the rule to be subject to section 815 and an explanation of it. An agency shall submit such a report separately for each such rule it promulgates. The explanation shall consist of the concise general statement of the rule's basis and purpose required by section 553

and such explanatory documents as are mandated by other statutory requirements.

"§ 817. Approval Bill

"(a) INTRODUCTION AND REFERRAL.—

"(1) INTRODUCTION.—Not later than 3 legislative days after the date on which an agency submits a report under section 816, the Majority Leader of each House of Congress shall introduce (by request) a bill the matter after the enacting clause of which is as follows: "The following agency rule may take effect:". The text submitted under section 816 shall be set forth after the colon. If such a bill is not introduced in a House of Congress as provided in the first sentence of this subsection, any Member of that House may introduce such a bill not later than 7 legislative days after the period for introduction by the Majority Leader.

"(2) REFERRAL.—A bill introduced under paragraph (1) shall be referred to the Committees in each House of Congress with jurisdiction over the subject matter of the rule involved.

"(b) PROCEDURE.—

"(1) CONSIDERATION IN THE HOUSE OF REPRESENTATIVES.—

"(A) COMMITTEE OR MEMBER ACTION.—Any committee of the House of Representatives to which a bill is referred shall report it without amendment, and with or without recommendation, not later than the 30th calendar day of session after the date of its introduction. If any committee fails to report the bill within that period, it is in order to move that the House discharge the committee from further consideration of the bill. A motion to discharge may be made only by a Member favoring the bill (but only at a time designated by the Speaker on the legislative day after the calendar day on which the Member offering the motion announces to the House his intention to do so and the form of the motion). The motion is highly privileged. Debate thereon shall be limited to not more than one hour, the time to be divided in the House equally between the proponent and an opponent. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order.

"(B) HOUSE ACTION.—After a bill is reported or a committee has been discharged from further consideration, it is in order to move that the House resolve into the Committee of the Whole House on the State of the Union for consideration of the bill. If reported and the report has been available for at least one calendar day, all points of order against the bill and against consideration of the bill are waived. If discharged, all points of order against the bill and against consideration of the bill are waived. The motion is highly privileged. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. During consideration of the bill in the Committee of the Whole, the first reading of the bill shall be dispensed with. General debate shall proceed, shall be confined to the bill, and shall not exceed one hour equally divided and controlled by a proponent and an opponent of the bill. After general debate, the bill shall be considered as read for amendment under the five-minute rule. At the conclusion of the consideration of the bill, the Committee shall rise and report the bill to the House without inter-

vening motion. The previous question shall be considered as ordered on the bill to final passage without intervening motion. A motion to reconsider the vote on passage of the bill shall not be in order.

"(C) APPEALS.—Appeals from decisions of the Chair regarding application of the rules of the House of Representatives to the procedure relating to a bill shall be decided without debate.

"(2) CONSIDERATION IN THE SENATE.—

"(A) REFERRAL AND REPORTING.—Any bill introduced in the Senate shall be referred to the appropriate committee or committees. A committee to which a bill has been referred shall report the bill without amendment not later than the 30th day of session following the date of introduction of that bill. If any committee fails to report the bill within that period, that committee shall be automatically discharged from further consideration of the bill and the bill shall be placed on the Calendar.

"(B) BILL FROM HOUSE.—When the Senate receives from the House of Representatives

a bill, such bill shall not be referred to committee and shall be placed on the Calendar.

"(C) MOTION NONDEBATABLE.—A motion to proceed to consideration of a bill under this subsection shall not be debatable. It shall not be in order to move to reconsider the vote by which the motion to proceed was adopted or rejected, although subsequent motions to proceed may be made under this paragraph.

"(D) LIMIT ON CONSIDERATION.—

"(i) VOTE.—After no more than 10 hours of consideration of a bill, the Senate shall proceed, without intervening action or debate (except as permitted under subparagraph (F)), to vote on the final disposition thereof to the exclusion of all motions, except a motion to reconsider or to table.

"(ii) MOTION TO EXTEND.—A single motion to extend the time for consideration under clause (i) for no more than an additional 5 hours is in order before the expiration of such time and shall be decided without debate.

"(iii) TIME FOR DEBATE.—The time for debate on the disapproval bill shall be equally divided between the Majority Leader and the Minority Leader or their designees.

"(E) NO MOTION TO RECOMMIT.—A motion to recommit a bill shall not be in order.

"(F) DISPOSITION OF SENATE BILL.—If the Senate has read for the third time a bill that originated in the Senate, then it shall be in order at any time thereafter to move to proceed to the consideration of a bill for the same special message received from the House of Representatives and placed on the Calendar pursuant to subparagraph (B), strike all after the enacting clause, substitute the text of the Senate bill, agree to the Senate amendment, and vote on final disposition of the House bill, all without any intervening action or debate.

"(G) CONSIDERATION OF HOUSE MESSAGE.—Consideration in the Senate of all motions, amendments, or appeals necessary to dispose of a message from the House of Representatives on a bill shall be limited to not more than 4 hours. Debate on each motion or

amendment shall be limited to 30 minutes. Debate on any appeal or point of order that is submitted in connection with the disposition of the House message shall be limited to 20 minutes. Any time for debate shall be equally divided and controlled by the proponent and the majority manager, unless the majority manager is a proponent of the motion, amendment, appeal, or point of order, in which case the minority manager shall be in control of the time in opposition.

SEC. 3. TECHNICAL AMENDMENTS.

(a) HEADING.—Chapter 8 of title 5, United States Code, is amended by inserting before section 801 the following:

"SUBCHAPTER I—DISCRETIONARY CONGRESSIONAL REVIEW".

(b) REFERENCE.—Section 804 of title 5, United States Code, is amended by striking "this chapter" and inserting "this subchapter".

(c) TABLE OF SECTIONS.—The table of sections for chapter 8 of title 5, United States Code, is amended by inserting before the reference to section 801 the following:

"SUBCHAPTER I—DISCRETIONARY CONGRESSIONAL REVIEW"

and by inserting after the reference to section 808 the following:

"SUBCHAPTER II—MANDATORY REVIEW OF CERTAIN RULES

"815. Rules subject to mandatory Congressional review.
"816. Agency submission.
"817. Approval bill.".

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